United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

680

No. 2082.

E. HILTON JACKSON, TRUSTEE OF THE ESTATE OF HENRY N. GIRARD, A BANKRUPT, APPELLANT,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 28, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1910.

In the Court of Appeals of the District of Columbia.

No. 2082.

E. HILTON JACKSON, Trustee, &c., Appellant,
vs.
WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, a Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed November 19, 1907.

In the Supreme Court of the District of Columbia.

49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, a Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

E. Hilton Jackson, as trustee of the estate and effects of Henry N. Girard, a bankrupt, according to the force, form and effect of the several statutes concerning bankrupts, sues the Washington, Balti-

more and Annapolis Electric Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Maryland, having offices for the transaction of its business located in the City of Washington, in the District of Columbia, and a portion of its electric railway extending through and operated in said District: For that whereas, on a certain day, to wit, on the 16th day of June, 1906, Henry N. Girard and the said Railway Company entered into and duly executed a contract under seal, which said contract is here shown to the Court, whereby it was mutually covenanted and agreed by and between them, substantially, as follows, to wit: That the said Girard should furnish and deliver to said Railway Company at least 75,000 cross-ties
2 and approximately 50,000 feet, board measure, of switch-ties, free from all claims for labor or other charges on same, and all transportation charges to the point of delivery in said contract designated, namely, at Odenton, Maryland, or such other point or points on the line of said Railway Company's proposed railroad as might be directed in writing by said Railway Company; that said ties were to be delivered F. O. B. cars at such point or points, and were to be in strict accordance with the specifications set out in said contract, as follows, to wit: the said cross-ties were to be made from live, sound merchantable chestnut timber, eight feet long, not less than six inches nor more than seven inches thick, none to be less than six inches face, and the total number delivered to average not less than seven inches face; said ties were to have square ends, and to be well made pole or sawed ties with parallel face. The said switch-ties were required in lengths varying by six inches from eight feet six inches to fourteen feet six inches, to be sawed from sound merchantable white oak timber, seven inches thick, and nine inches wide, with square corners and ends and parallel faces. Both the cross-ties and switch-ties were to be shipped by the said Girard subject to the inspection of the said Railway Company's engineers, which engineers said Railway Company covenanted and agreed to furnish upon the request of said Girard for the purpose of inspecting said ties at the point or points of delivery, unless this should prove unsatisfactory, in which event the said Railway Company should have the right to have said ties inspected at the point or points of shipment, in which case said Railway Company
3 covenanted and agreed to furnish and send its engineer or inspector, upon the request of said Girard, to such point or points of shipment to inspect said ties before the said Girard should be required to load them in or upon the cars. The said Girard covenanted and agreed to commence the shipment of said ties at once, and to continue such shipments at the rate of not less than 15,000 cross-ties and three sets of switch-ties per month, and all shipments were to be completed by November 15th, 1906. The said Railway Company covenanted and agreed to accept such shipments of said ties, and to pay to said Girard, his executors or administrators, in good and lawful money of the United States, the rates and prices following, to wit: for all first quality cross-ties shipped on freight rate over eight cents per 100 pounds, price each, fifty-nine cents; for all first quality cross-ties shipped on freight rate of eight cents

or under per 100 pounds, price each, fifty-five cents; for all switch-ties, price per 1000 feet, board measure, $24.00. The said Railway Company covenanted and agreed to pay to said Girard, at the rate aforesaid, monthly, on or before the 10th day of each month, for all ties furnished, delivered and inspected, under said contract, up to and including the last day of the preceding calendar month, certified to by the said Railway Company's engineer or inspector. And the plaintiff avers that said Girard at once entered upon the discharge of said contract when and in the manner required by the same; that he was continuing to do and perform all that was required of him under said contract by actually shipping and delivering to said Railway Company at Odenton, Maryland, at the
4 rate of not less than 15,000 cross-ties and three sets of switch-ties per month, until he had delivered about 28,430 cross-ties and 13,212 feet, board measure, of switch-ties; that said Girard has at all times been ready, willing and able to fully carry out and perform said contract on his part. Yet the said Railway Company, although often requested by said Girard so to do, hath not kept and performed its said covenants and agreements in said contract contained, but, on the contrary, hath neglected and refused so to do, so as to prevent the said Girard, prior to his bankruptcy, from going on and fully performing said contract on his part. The plaintiff avers that said Railway Company, about six weeks after said Girard had entered upon the performance of said contract, as hereinabove set forth, refused to allow him, the said Girard, to deliver any more ties for the reason, assigned by said Railway Company, that the ties were arriving more rapidly than it could use them, although, the plaintiff avers, the number of ties delivered up to that time had not exceeded the number which the said Girard was required to deliver under said contract. The said Railway Company, although often requested by said Girard to be allowed to go on and complete the performance of said contract on his part, yet it refused and prevented said Girard from delivering any more ties until about the 27th day of October, 1906, when in response to another request from him it directed him to proceed with the delivery of the ties. The plaintiff avers that the said Girard at once upon the receipt by him of said direction, and prior to his bankruptcy, made the necessary arrangements to complete the carrying out of said contract on his part; that he,
5 the said Girard, got the necessary ties in place for the next shipment, and also the necessary cars, at certain places, to wit, at Widewater, Burks, Fairfax, Barboursville, Vienna, Herndon and Wiehle, all of said places being in the State of Virginia, and requested the said Railway Company to send its engineer or inspector to said points to inspect said ties in pursuance of its covenants in said contract contained, before loading them in and upon said cars, the said Railway Company having subsequently to the execution of said contract determined that the inspection of said ties at the point of delivery was unsatisfactory, and exercised its right to have said ties inspected at the point or points of shipment instead. The plaintiff avers that it was the duty of said Railway Company to send its engineer or inspector to inspect said ties at the point or

points of shipment before it became the duty of said Girard to load them in and upon the cars; yet the said Railway Company, although often requested by the said Girard so to do, neglected and refused, prior to said Girard's bankruptcy, to send its engineer or inspector to inspect said ties, and notified said Girard at the time of its refusal so to do, and also at other times, that it would accept no more ties from him, and would no longer be bound by any of its covenants and agreements in said contract contained, thus preventing said Girard from carrying out and fully performing said contract on his part. And the plaintiff avers that said Girard has at all times been ready, willing, and able, to carry out and fully perform said contract on his part, but that the breach by said Railway Company of its covenants and agreements, in said contract contained,
6 as last above set forth, prevented him from so doing without any default on his, the said Girard's, part. And the plaintiff avers that by reason of said breach by said Railway Company the said Girard, prior to his bankruptcy, was caused to sustain divers great losses, damages and injuries, amounting to a large sum of money, to wit, the sum of fifteen thousand ($15,000) dollars. And the plaintiff further avers that the said Girard on or about the 5th day of November, 1906, duly filed his petition in bankruptcy in the Supreme Court of the District of Columbia, holding a Court in Bankruptcy, in which said petition the contract hereinabove referred to was scheduled as one of his assets; that on or about the 5th day of November, 1906, said Girard was, by an order of said Court, duly adjudged a bankrupt; that at a meeting of the creditors of said Girard, held on or about the 19th day of November, 1906, he, the plaintiff, was duly elected trustee of the estate and effects of said bankrupt, and that he, the plaintiff, subsequently qualified by giving the required bond, and entered upon the duties of such trustee. By virtue of all which, the plaintiff avers that he became and was vested by law with all the right, title and interest in and to all property owned by said Girard at the time that he was adjudicated a bankrupt, including whatever rights he, the said Girard, had against said Railway Company growing out of the breach by it of the contract hereinabove mentioned; that it therefore became the duty of the plaintiff, as such trustee, to prosecute such rights as belonged to said Girard by reason of said breach, and therefore he, the plaintiff, brings this suit, and claims $15,000, besides
7 costs.

And for this also, the plaintiff, E. Hilton Jackson, as trustee of the estate of Henry N. Girard, a bankrupt, sues the Washington, Baltimore and Annapolis Electric Railway Company, a corporation created, organized and existing under the laws of the State of Maryland, having its offices and agents in the City of Washington, in the District of Columbia, for the transaction of its business: For that whereas, the said Girard and the said Railway Company on or about the 16th day of June, 1906, entered into and duly executed a certain contract under seal, which said contract is in the words and figures following, to wit:

Articles of agreement, Made and entered into this sixteenth day of June, A. D. 1906, in the City of Baltimore, State of Maryland, between the Washington, Baltimore and Annapolis Electric Railway Company, a corporation of the State of Maryland, party of the first part, and hereinafter called the Company, and H. N. Girard, of Washington, D. C., party of the second part, and hereinafter called the Contractor.

Witnesseth: The parties hereto in consideration of the sum of five dollars in hand paid by each of the parties hereto to the other and for and in consideration of the promises and of the covenants, agreements and payments hereinafter mentioned to be made and performed, hereby covenant and agree to and with each other as follows, viz:

8 First. The Contractor agrees that he will furnish and sell seventy-five thousand (75,000) or more cross ties and approximately fifty thousand (50,000) feet board measure of switch ties free from any and all claims for labor or other charges on same and all transportation charges to the point of delivery herein designated and in strict accordance with the Specifications incorporated herein, which Specifications are made a part of this agreement, and are hereby declared and accepted as an essential part of the same.

Second. The Contractor hereby agrees that in case of failure to furnish and deliver the ties at the times and on the terms herein specified, said Company shall be released from any further obligation arising out of this agreement and said Company may proceed to purchase its required ties elsewhere as it may elect, and any difference in price paid therefor if in excess of the price herein agreed to be paid shall be born- and paid by the Contractor.

Third. The Contractor further agrees that he will commence shipment at once and that shipments shall thereafter continue at the rate of 15,000 cross-ties per month and not less than three sets of switch ties per month and that all shipments shall be completed by November 15th, 1906.

Fourth. The Company for and in consideration of the true and faithful performance of the covenants and agreements made by the Contractor, hereby covenants and agrees to pay or cause

9 to be paid to the Contractor, his Executors or Administrators, the rates and prices hereinafter named, to wit:

For all first quality cross-ties shipped on freight rate over 8¢ per 100 lbs. Price each	$.59
For all first quality cross-ties shipped on freight rate of 8¢ or under per 100 lbs. Price each	.55
For all switch ties. Price per M. B. M	24.00

Fifth. And the Company agrees to pay the Contractor at the rates aforesaid monthly, on or before the 10th of each month, for all ties furnished, delivered and inspected, up to and including the last day of the preceding calendar month, certified to by the Company's Engineers, to be in accordance with this contract.

Sixth. The Contractor further agrees to prosecute his work in the most energetic and expeditious manner and in compliance with the following specifications:

Specifications.

The word "Engineers" as herein used refers to The Roberts and Abbott Company, or such other Engineer or Engineers as may be in the employ of the Company during the life of this agreement.

All ties to be delivered F. O. B. cars at Odenton, Maryland,
10 or at such other point or points on the line of the Company's proposed railroad as shall be directed in writing by the Company. Should the Company elect to receive ties at Junction of B. & O. R. R. and Chesapeake Beach Railway in District of Columbia, delivered price shall be adjusted on basis freight rate to said point. Ties to be shipped subject to the inspection of Company's Engineers, said inspection to be made at the point of delivery herein designated or at such other point or points of delivery as shall be designated by the Company, as hereinbefore provided.

It is further understood the Company will accept ties on Contractor's inspection at points of shipment, which inspection, however, must be approved by Engineers of said Company. If not satisfactory, then Company shall furnish inspector to inspect ties at points of shipment.

Ties will be classed as first quality only.

There will be not less than 75,000 cross-ties required, the Company to have the option of increasing this number as it may hereafter designate. All cross-ties to be made from live, sound merchantable chestnut timber, eight feet long, not less than six inches nor more than seven inches thick, none to be less than six inches face and the total number delivered to average seven inches face.

All ties to have square ends, and to be well made pole or sawed ties with parallel faces.

There will be approximately 50,000 feet board measure
11 of switch ties required in lengths varying by six inches from eight feet six inches to fourteen feet six inches. All switch ties to be sawed from sound merchantable white oak timber, seven inches thick and nine inches wide, with square corners and ends and parallel faces.

The said parties, for themselves, their heirs, successors, executors and administrators, do hereby agree to the full performance of the covenants herein contained.

In witness whereof the party of the first part has caused its corporate name to be signed hereto by its Treasurer and its corporate seal affixed hereto, duly attested by its Secretary, and the party of the second part has hereunto set his hand and seal the day and year first above written.

[Seal of the Company.]

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY,
By JNO. G. MASTERTON, *Treasurer.*

Attest:
JNO. G. MASTERTON, *Secretary.*

[SEAL.] H. N. GIRARD.

In presence of:

The plaintiff says that said Girard duly entered upon and was faithfully and properly carrying out and performing said contract when and in the manner required by the same; that he, the said Girard, was ready, willing, and able, at all times to fully carry out and perform said contract, and would have fully carried out and performed said contract on his part had he not been prevented from so doing by the failure of said Railway Company to carry
12 out and perform said contract on its part. The plaintiff says that said Railway Company, although often requested by the said Girard so to do, did not carry out and perform the covenants in said contract contained on its part, but on the contrary, and without any default on the part of said Girard, neglected and refused in this, to wit: It did not and would not furnish its engineer or inspector to inspect the ties at the point or points of shipment, namely, Widewater, Burks, Fairfax, Barboursville, Vienna, Herndon, and Wiehle (all in Virginia), or at either of said points; and it did not and would not accept said ties from said Girard at the rate of 15,000 cross-ties per month and three sets of switch-ties per month; and it prevented said Girard from going on and completing the performance of said contract on his part by its action in so doing. By reason of which improper conduct on the part of said Railway Company the plaintiff says it committed a breach of its covenants and undertakings in said contract contained, and thereby caused the said Girard to sustain the loss of divers great gains and profits and damages and injuries amounting to a large sum of money, to wit, the sum of fifteen thousand ($15,000.) dollars; and the plaintiff says that the execution of said contract by said Girard and the said Railway Company, the breach of said contract by said Railway Company, hereinabove complained of, and the said losses, damages and injuries resulting to said Girard from said breach, were all prior to the bankruptcy of said Girard. And the plaintiff further says, that said Girard on or about the 5th day of November, 1906, duly filed his petition in bankruptcy in the
13 Supreme Court of the District of Columbia, holding a Court in Bankruptcy, in which said petition the contract hereinabove referred to was scheduled as one of his assets; that on or about the 5th day of November, 1906, said Girard was, by an order of said Court, duly adjudged a bankrupt; that at a meeting of the creditors of said Girard, held on or about the 19th day of November, 1906, he, the plaintiff, was duly elected trustee of the estate and effects of said bankrupt, and that he, the plaintiff, subsequently qualified by giving the required bond, and entered upon the duties of such trustee. By virtue of all which, the plaintiff avers that he became and was vested by law with all the right, title and interest in and to all property owned by said Girard at the time that he was adjudicated a bankrupt, including whatever rights he, the said Girard, had against said Railway Company growing out of the breach by it of the contract hereinabove mentioned; that it therefore became the duty of the plaintiff, as such trustee, to prosecute such rights as belonged to said Girard by reason of said breach, and therefore he, the plaintiff, brings this suit, and claims $15,000, besides costs.

And for this also, the plaintiff, E. Hilton Jackson, as trustee of the estate of Henry N. Girard, a bankrupt, sues the Washington, Baltimore and Annapolis Electric Railway Company: For that whereas, on or about the 16th day of June, A. D. 1903, in the City of Baltimore, State of Maryland, by a certain contract in writing then and there made and executed in duplicate under seal, between the said defendant, a corporation of the State of Maryland, of the one
14 part and the said Girard of the other part, and delivered by each to the other, one of the duplicate originals of which said contract, sealed with the seal of the defendant, and with the seal of said Girard, the plaintiff now brings here into court, the said Girard, for the consideration therein mentioned, did covenant, promise, and agree to and with the defendant to furnish and deliver to it about 75,000 cross-ties and about 50,000 feet, board measure, of switch-ties, to be delivered at the rate of 15,000 cross-ties per month, and not less than three sets of switch-ties per month, until all of said ties should be delivered, at a certain price, payable by the defendant to the said Girard, as in said contract is mentioned. And the defendant, for itself and its successors, did thereby covenant, promise, and agree to and with the said Girard, his executors, and administrators, amongst other things, that it, the defendant, and its successors, should and would purchase, accept, and pay the said Girard for said ties when and in the manner in said contract specified. And the defendant, for itself, and its successors, did thereby further covenant, promise, and agree, to and with the said Girard, his executors, and administrators, that it, the defendant, and its successors, should and would at all times during the continuance of said contract, at its own costs and charges, send one or more of its engineers or inspectors, whenever requested so to do by said Girard, to the point or points of shipment of said ties for the purpose of inspecting and accepting said ties for and on its, the defendant's, behalf at such point or points. By virtue of which said contract, the said Girard afterwards, to wit, on the 16th day of June, 1906, entered upon the performance of
15 his covenants, promises, and agreements, in said contract contained, by furnishing and delivering to the defendant cross-ties and switch-ties when and in the manner in said contract particularly specified, and continued so to furnish and deliver said ties until he, the said Girard, was stopped and prevented from going on by the failure on the part of the defendant to keep and perform its covenants, promises and agreements, in said contract contained, in this, to wit: it, the defendant, refused to accept the ties from said Girard; it refused to send one or more of its engineers or inspectors to inspect the ties; and it otherwise prevented said Girard from fully carrying out and performing said contract on his part, although the said Girard often requested it, the defendant, to accept said ties and to send its inspector or engineer to inspect them after he had gotten them in place ready for shipment. And although the said Girard hath always, from the time of the making of said contract, hitherto been ready, willing, and able to carry out and perform all things in the said contract contained on his part to be performed and carried out, nevertheless, the defendant, in violation of its covenants, prom-

ises, and agreements, hath not performed and carried out the things in said contract contained on its part to be performed and carried out. In fact the plaintiff says that the defendant did not allow the said Girard to carry out and perform on his part his covenants, promises, and agreements, in said contract contained; but for a long time, to wit, since about six weeks after the making of said contract, it, the defendant, did refuse to allow the said Girard to furnish
16 and ship it any more ties; that it, the defendant, refused to be bound by its covenants, promises, and agreements, in said contract contained, and so notified said Girard; that it, the defendant, refused to send its engineer or inspector to inspect and accept said ties, although often requested by said Girard so to do. And so the plaintiff saith that the defendant, although often requested, hath not kept the said covenants, promises, and agreements, so by it made as aforesaid, but hath broken the same, and to keep the same with the said Girard hath hitherto refused, and still doth refuse, to the damage of the said Girard in the sum of fifteen thousand ($15,000) dollars; all of which, the plaintiff says, transpired prior to the bankruptcy of the said Girard. And the plaintiff further says, that said Girard on or about the 5th day of November, 1906, duly filed his petition in bankruptcy in the Supreme Court of the District of Columbia, holding a Court of Bankruptcy, in which said petition the contract hereinabove referred to was scheduled as one of his assets; that on or about the 5th day of November, 1906, said Girard was, by an order of said Court, duly adjudged a bankrupt; that at a meeting of the creditors of said Girard, held on or about the 19th day of November, 1906, he, the plaintiff, was duly elected trustee of the estate and effects of said bankrupt, and that he, the plaintiff, subsequently qualified by giving the required bond, and entered upon the duties of such trustee. By virtue of all which, the plaintiff avers that he became and was vested by law with all the right, title and interest in
17 and to all property owned by said Girard at the time that he was adjudicated a bankrupt, including whatever rights he, the said Girard, had against said Railway Company growing out of the breach by it of the contract hereinabove mentioned; that it therefore became the duty of the plaintiff, as such trustee, to prosecute such rights as belonged to said Girard by reason of said breach, and therefore he, the plaintiff, brings this suit, and claims the sum of $15,000.00, besides costs.

E. BEVERLY SLATER,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of the service hereof; otherwise judgment.

E. BEVERLY SLATER,
Attorney for Plaintiff.

Pleas.

Filed March 9, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

Comes now the defendant above-named, by its attorneys,
18 and, for pleas to the declaration herein, and to each and every count thereof, says:

1. That the plaintiff, trustee of the Estate of Henry N. Girard, bankrupt, has not well and truly fulfilled, kept and performed all and every, or either or any, the covenants in the said certain written contract under seal contained in said declaration referred to on the part of said Henry N. Girard and on the part of his legal representative to be fulfilled, kept and performed; and this the defendant is ready to verify.

2. That the certain Henry N. Girard, now bankrupt, whose estate is represented by plaintiff as alleged, did not well and truly fulfill, keep and perform all and every the covenants in the said certain written contract under seal contained, in said declaration referred to, on his part to be fulfilled, kept and performed; and this the defendant is ready to verify.

3. That the said Henry N. Girard, did not, prior to his said bankruptcy, nor did the plaintiff, Trustee of the Estate of said Henry N. Girard, bankrupt, since the bankruptcy of the latter, well and truly fulfill, keep and perform all and every the covenants in the said written contract under seal contained, in said declaration referred to, on the part of said Henry N. Girard, and on the part of his Trustee in Bankruptcy, to be fulfilled, kept and performed; and this the defendant is ready to verify.

4. That the defendant has well and truly fulfilled, kept and performed all and every the covenants in the said certain written
19 contract under seal contained, in said declaration referred to, on its part to be fulfilled, kept and performed; and this the defendant is ready to verify.

5. That this defendant admits the due execution of the said certain written contract under seal contained in said declaration referred to, but denies that it has broken its said covenants, or any or either of them, in manner and form as the plaintiff against it has complained; and this the defendant is ready to verify.

6. That one of the paragraphs in said written contract under seal, in said declaration referred to, is as follows:

"Second. The contractor hereby agrees that in case of failure to furnish and deliver the ties at the times and on the terms herein specified, said company shall be released from any further obligation arising out of this agreement and said company may proceed to purchase its required ties elsewhere, as it may elect; and any difference in price to be paid, shall be borne and paid by the contractor."

And the defendant in fact says, that the contractor, the said Henry N. Girard, failed to furnish and deliver to the said company, the defendant, the ties at the times and on the terms in said contract specified; by reason whereof this defendant was released from any further obligation arising out of said contract; and this the defendant is ready to verify.

7. That the said certain written contract under seal, in said declaration referred to, did not, nor did any cause of action arising thereout by reason of the alleged breach of contract by this defendant, pass to the plaintiff, as the said plaintiff in his declaration hath alleged.

20 8. That the said Henry N. Girard has not at all times been ready, willing and able to carry out and perform said certain written contract under seal, in said declaration referred to, as hath been alleged in said declaration.

9. That the defendant did not refuse to allow the said Girard to deliver any more ties under said certain written contract in the declaration referred to, for the reason, as alleged in said declaration, that the ties were arriving more rapidly than this defendant could use them. And this defendant further says that it was always ready to have inspected and received from the said Girard the ties called for in said contract down to the time it was informed that the said Henry N. Girard had applied for the benefit of the Bankruptcy Act; at which time the said Girard notified the defendant that he was unable to make further deliveries of ties thereunder; and this it is ready to verify.

10. That the plaintiff never tendered itself ready, able and willing to deliver to this defendant the ties and other materials called for in said certain written contract, in the declaration referred to, which had not already been delivered to the defendant by the said Henry N. Girard prior to his application for the benefit of the Bankruptcy Act; and this it is ready to verify.

11. That prior to the 30th day of October, 1906, the said Henry N. Girard had supplied to the defendant certain ties under his said contract, and the defendant had paid him the full contract price therefor; and, while defendant was waiting for plaintiff to supply further ties under said contract, to-wit, on said 30th day of

21 October, 1906, the said Henry N. Girard advised the defendant that he was about to go into voluntary bankruptcy, and that he would be unable and was unwilling to supply to the defendant any further ties under said contract, and that said then existing contract between him and this defendant would terminate; and the defendant in fact says, that said Girard did thereafter go into voluntary bankruptcy, leaving his certain contract unperformed, except as in this plea above stated; and, thereupon and thereafter,

neither the said Girard nor the plaintiff, his Trustee in Bankruptcy, as aforesaid, performed or tendered willingness and ability to perform, the said contract, and this the defendant is ready to verify.

MARBURY and GOSNELL,
A. A. HOEHLING, JR.,
Attorneys for Defendant.

Joinder of Issue upon 1, 2, 3, 4, 5, 6, 8, 9 *and* 11*th Pleas.*

Filed March 13, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

The plaintiff joins issue upon the defendant's First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh pleas herein.

E. BEVERLY SLATER,
Attorney for Plaintiff.

Amended 7th Plea.

Filed April 1, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

Comes now the defendant, above-named, by its attorneys, and, with leave of the court in that behalf first had and obtained, files the following plea numbered seven, in lieu of the former plea of the same number:

7. That the said Henry N. Girard, prior to his application for the benefit of the bankruptcy act, to-wit, on or prior to July 16, 1906, did, for a then present fair and valuable consideration, and with no intent or purpose on his part to hinder, delay or defraud his creditors, or any of them, transfer and assign to the National City Bank, of Washington, D. C., the latter being such assignee

thereof in good faith and for a then present fair and valuable consideration, the certain written contract under seal in the said declaration herein referred to, and all the right, title, and interest of him, the said Girard, in and to all moneys due and to become due thereunder, including all claims or demands accrued or to accrue
23 thereunder against this defendant; and on, to-wit, said July 16, 1906, said Girard notified this defendant of the fact of said transfer and assignment; and, thereupon, on, to-wit, July 17, 1906, this defendant assented to said transfer and assignment, and from and after the date of said transfer and assignment and assent thereto by defendant, as aforesaid, all moneys due by defendant under said contract were in fact paid by it to the said National City Bank of Washington, D. C. or upon its order; that defendant denies that said Henry N. Girard did, thereafter, schedule said claim so sued on herein as an asset of his estate, as in said declaration alleged; and the defendant says, that the said certain written contract under seal, herein and in said declaration referred to, did not, nor did any cause of action arising thereout by reason of the alleged breach of contract by this defendant, pass to the plaintiff, as the said plaintiff in his declaration hath alleged; all of which the defendant is ready to verify.

MARBURY & GOSNELL,
A. A. HOEHLING, JR.,
Attorneys for Defendant.

Joinder of Issue upon 7th Plea.

Filed April 4, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Defendant.

24 The plaintiff joins issue upon the defendant's Seventh plea herein.

E. BEVERLY SLATER,
Attorney for Plaintiff.

Memorandum.

April 15, 1909—Verdict for Plaintiff for 1 cent.

Supreme Court of the District of Columbia.

FRIDAY, *May 7th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 49960. At Law.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Def't.

Upon consideration of plaintiff's motion for a new trial, filed herein, it is ordered, that said motion be, and the same is hereby overruled, and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein, one cent for his damages as aforesaid assessed, together with costs of suit to be taxed by the Clerk, and have execution thereof.

25 *Order for Appeal.*

Filed May 12, 1909.

In the Supreme Court of the District of Columbia, the 12th day of May, 1909.

At Law. No. 49960.

JACKSON, Trustee, etc.,
vs.
WASH., BALTO. & ANNAPOLIS ELECTRIC RY. CO.

The Clerk of said Court will please enter an appeal to the Court of Appeals, and issue citation to the appellee.

E. BEVERLY SLATER,
Attorney for Jackson, Trustee.

26 Filed May 20, 1909. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, a Bankrupt,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY.

The President of the United States to Washington, Baltimore and Annapolis Electric Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing

the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 12" day of May, 1909, wherein E. Hilton Jackson, Trustee as aforesaid, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 12th day of May in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Service of the above Citation accepted this 19th day of May, 1909.
A. A. HOEHLING, JR.,
Attorney for Appellee.

[Endorsed:] 9. No. 49960. Law. Jackson vs. W. B. & A. Elec. Ry. Co. Citation. Issued May 12", 1909. Filed May 20, 1909. J. R. Young, Clerk. E. Beverly Slater, Attorney for Appellant.

27 *Memoranda.*

May 22, 1909.—Appeal Bond filed.

Time to submit Bill of Exceptions and to file Transcript of Record extended from time to time to, and including, November 1st, 1909.

Supreme Court of the District of Columbia.

FRIDAY, *October 8th,* 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 49960. At Law.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt, Plaintiff,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, Def't.

Comes now the plaintiff by his attorney Mr. E. Beverly Slater, and presenting to the Court the Bill of Exceptions taken at the trial of this cause, prays that the same be signed and made of record nunc pro tunc, which is accordingly done.

28 *Bill of Exceptions.*

Filed October 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY.

Be it remembered, that on the 15th day of April, A. D. 1909, before the Honorable Harry M. Clabaugh, Chief Justice of said Court, and a jury regularly impanelled, the above entitled cause came on to be heard at 10 o'clock, A. M., upon issues joined. And the plaintiff to maintain the issues on his part submitted the following evidence:

HENRY N. GIRARD, being first duly sworn, testified:

On direct examination:

That he is the same Henry N. Girard mentioned in the declaration filed in this action, and is the same person who was adjudicated a bankrupt upon his petition filed November 5th, 1906, in the Supreme Court of the District of Columbia. He also testified that he entered into the contract of June 16th, 1906, with the defendant company by which he agreed to furnish and sell to it about 75,000 cross ties and 50,000 feet board measure of swtich ties, upon
29 the terms and conditions set out in said contract; that after the execution of said contract he at once began delivering to the defendant the ties in accordance with the requirements of said contract, and actually delivered 28,430 cross ties and 13,212 feet board measure of the swtich ties; that within a few weeks after he began delivering the ties the defendant company requested him to ease up delivering, as the ties were coming in faster than it could use them, and that it made this request of him several times, although he was not delivering the ties more rapidly than his contract called for; that the defendant finally stopped him from delivering the ties altogether, after he had delivered the 28,430 cross ties and the 13,212 feet of switch ties, and never allowed him to deliver any more although he made repeated demands and requests of it to be allowed to go on and complete his contract; that the balance of the cross ties undelivered amounted to 46,570, and the balance of the switch ties undelivered amounted to 36,788 feet board measure. He further testified that for the purpose of carrying out this contract he contracted with several different parties in different sections of Virginia to furnish him a certain number of ties, and that he kept his own sawmill running cutting ties, and that the ties cut by his

own mill he kept a sort of bank to supply any deficiencies that might occur in the deliveries to be made him by the parties with whom he had contracted. He testified that he *contracted with Dan Lee* April 11th, 1906, to furnish him 30,000 cross ties; that of this lot he delivered to the defendant 1,871, and to other parties 2,888, leaving 25,241 available for use in carrying out his con-
30 tract with the defendant; that these ties he purchased at .30¢ per tie, and the charges, or freight rate, for delivering them amounted to .09¢ per tie, making a total cost to him per tie of .39¢; that the defendant was to pay him, according to his contract price, .55¢ per tie, making a profit to him of .16¢ per tie; that the profits which he lost by not being able to deliver the remaining 25,241 cross ties of this lot amounted to $4,038.56. He testified that he *contracted with Thomas Shackelford* May 17th, 1906, to furnish him 8,000 cross ties; that of this lot he delivered to the defendant 1,525, leaving available for use in carrying out his contract with the defendant 6,475; that these ties cost him .34¢ per tie, and .09¢ freight charges, making .43¢ per tie; that the defendant company was to pay him, according to the contract price, .55¢ per tie, or a profit of .12¢ per tie; that the profit which he lost by not being allowed to deliver the remaining 6,475 cross ties of this lot amounted to $777.00. He testified that he *contracted with R. S. Matthews* June 16th, 1906, to furnish him 5,000 cross ties; that of this lot he delivered to the defendant 755, leaving available for use in carrying out his contract with the defendant 4,245; that these ties cost him .33¢ and .13¢ freight charges, making a total of .46¢ per tie; that the defendant was to pay him, according to the contract, .59¢ per tie, or a profit per tie of .13¢; that the profit which he lost by not being allowed to deliver the remaining 4,245 cross of this lot amounted to $551.85. He testified that he *contracted with W. V. Moore* June 25, 1906, to furnish him 10,000 cross ties; that of this lot he delivered to the defendant 4,270, leaving 5,730 avail-
31 able for use in carrying out his contract with the defendant; that these ties cost him .38¢ and .12¢ freight charges, making a total of .50¢ per tie; that the defendant was to pay him, according to the contract, .59¢ per tie, or a profit of .09¢ per tie; that the profit which he lost by not being allowed to deliver the remaining 5,730 cross ties of this lot amounted to $515.70. He testified that he *would have delivered from his own mill* to the defendant 4,879 cross ties; that these ties cost him, on the stump .06¢, for sawing .04¢, for hauling to mill, .04¢, for sawing logs, .04¢, for hauling to depot .04¢, for loading on cars .01¢, and for freight charges .09¢, making a total of .32¢ per tie; that the defendant was to pay him, according to the contract, .55¢, or a profit of .23¢ per tie; that the profit which he lost by not being allowed to deliver these 4,879 cross ties amounted to $1,122.17. He testified that all of the above ties were located within a radius of fifty miles of Washington, D. C. He testified that he *contracted with Herbert Wingfield* to furnish him the 50,000 feet board measure of switch ties which he was to furnish the defendant; that he was to pay Mr. Wingfield $22. per thousand feet for these ties, and the defendant was to pay him $24. per thousand feet, or a profit of $2. per thousand feet; that he delivered to

the defendant 13,212 feet of these ties, leaving a balance of 36,738 feet undelivered; that the profits which he lost by not being allowed to deliver this balance of switch ties amounted to $735.

He further testified that he did not complete delivering the ties as called for by his contract with the defendant, because the
32 defendant prevented his doing so; that several times between July and October, 1906, he applied to the defendant company to let him go on and deliver the ties; that he frequently made these applications by telephoning and writing, and that the defendant always said they couldn't take any now, that they had all they could use and that he would have to hold up a while; that later on he went over to see Mr. Masterton, the Secretary and Treasurer of the Company, personally, and he (Masterton) agreed that he should go on and ship the balance of the ties; that he (witness) "came back and ordered cars placed at different points where he had ties located, and then when the cars were placed I notified him (Masterton) that I was ready for an inspector, and then he said he would not send an inspector at all, that he would call the contract off; said he wouldn't accept any more ties from me, 'We hear you are now on the verge of bankruptcy, and don't want to accept any more ties from you'." He further testified that prior to this time the defendant company had been accustomed to send its inspector to the points of shipment to inspect the ties before they were loaded on the cars; that about a month or two after the contract was made the defendant sent its inspector, and afterwards recalled him without letting him inspect any more ties; that after his conversation with Masterton in October, he (witness), in pursuance of Masterton's statement to go ahead and get the ties, he ordered cars placed at the places where he had ties, namely, at Vienna, Greeley, Widewater, Fairfax and Dun Loring; that he could not remember all the places, but thought he also had ties at Herndon and other places; that he knew he had a lot of ties; that after he ordered the
33 cars to be placed at these points he requested the defendant, both by letter and telephone, to send their inspector, but that it refused to do so; that he recognized Mr. Masterton's voice over the telephone when he was making this request. (At this point the correspondence between the parties which appears elsewhere in the record was read by counsel for the plaintiff and defendant respectively. He also testified that after his letter of August 24th to the railway company, in which he said "when you are ready for more ties, advise me, and I will arrange to ship them in as you need them", the defendant about a month or so later, which would bring the time down into October, although he could not just remember the dates, signified its willingness to accept more ties from him; that he frequently between the date of his letter of August 24th and the time when it signified its willingness to accept more ties in October, tried to get it (the railway company) to let him go on and deliver the ties; that he had a dozen or fifteen conversations with the defendant on this subject, probably; that he communicated with it once or twice, or three or four times a week; that the first permission he got from the railway company after the 24th of Au-

gust to deliver any more ties was "along the latter part of October, some time", and that this was the time when it promised to send its inspector and did not do so. He testified that his finances were such that he could have gone on and filled the contract; that he had made arrangements with the National City Bank, in Washington,
to let him have money to pay for the ties as fast as he ordered
34 them, and that the payments by the railway company for
the ties shipped to it were to be made to the bank, the bank giving him credit for all the money so paid to it, and charging him with all the money it let him have. He also testified that besides this he had made arrangements with his aunt to let him have as much as five thousand dollars, if he needed it, in carrying out this contract; that as the defendant would accept no more ties it was not necessary for him to get this money; that he could "at all times have filled the contract as the contract called for if they would have allowed me to go on with the shipments; but as they would not accept them, I could not force them onto them"; that his aunt who was going to let him have $5,000. if necessary was Miss Sarah McComb, of North Kingston, Rhode Island; that his contract bound him to complete delivering the ties by the 15th of November, and in October, when the company agreed to let him proceed with the delivery of the ties, he requested it to give him additional time sufficient to offset the delay it had put him to in which to complete the contract, and that the company (Masterton) said "You go ahead and commence shipping"; that about October, 1906, Mr. Masterton informed him that he had been offered ties at a less price than that named in his (witness's) contract with the company, but that Mr. Masterton never asked him to take any less for the ties which he was to ship. He testified that when Mr. Masterton refused to let him ship any more ties because he had heard he was going into bankruptcy, he (witness) told him that didn't make any difference about that. "I was ready to carry out the contract. I said if I did
go into bankruptcy, it wouldn't affect our contract any, that
35 I had arrangements all made with the National City Bank
in Washington that I could go on and ship the ties according to contract just the same as ever"; that at the time of this conversation Mr. Masterton told him he had been offered ties at a less price than his contract called for; that Mr. Masterton refused to accept any more ties from him, but that he did not give as his reason the fact that he had been offered the ties at a less price, although he (witness) "took it for that."

On cross-examination:

That he knows Mr. Albert Preston, who is in the tie business; that he did not want the railroad company to let Mr. Preston carry out his contract for him; that Mr. Preston offered him $1,500, if he would assign the contract to him, and it would be acceptable to the railroad company; that there was nothing said about so much per tie, Mr. Preston simply offered him $1,500. in cash; that there were about 45,000 or 50,000 ties undelivered at that time; that he went over and asked the company if it would accept an assignment

of the contract, and it objected to an assignment of it to Mr. Preston; that this was before the company refused to accept any more ties from him; that about this time Bates Company, who had attached his property in Baltimore, offered him $2,000. for his contract, if the company would accept an assignment of it, and that he was willing to make this assignment if the company were not going to accept any more ties from him; that the company refused to accept any more ties before October; that they recalled their
36 inspector, and wouldn't let him ship any more ties; that he did not prior to the refusal on the part of the defendant to accept any more ties want to assign his contract to the Bates Company; that the question of assigning his contract to Preston or the Bates Company was discussed at about the same time, although he could not remember the dates; that he did not remember whether the money which had been stopped by the attachment proceedings in Baltimore had been released at that time or not, as his matters were then in tne hands of Douglass & Douglass, and he didn't pay much detailed attention to it; that he doesn't remember the dates exactly, or now things happened; that he was ready at all times to fulfill the contract; that he did not take up seriously the question of commencing the delivery of the undelivered ties until about the 20th of October, because the railroad company recalled its inspector about the 10th of August, and would not let him deliver any more ties; that the attachments against him made no difference so far as his being able to deliver the ties was concerned, as he "was ready to go ahead and fulfill the contract"; that he could ship ties any time; that he might have written the defendant that one of the attachments down in Virginia was for a fraudulent claim, and that he had resisted it for that reason; that the attachment proceedings against him down in Virginia were for the same thing that the attachments were laid against him in Baltimore. He further testified that the ties he got from Thompson, in Virginia, he bought from W. V. Moore, and that these were the ties which Moore was to let him have under the contract to furnish him 10,000;
37 that he recollects that a check which he gave for a portion of these ties went to protest; that his bank accounts were attached, and after that no checks were paid; that the Moore check and the Thompson check were both protested, but that he does not recollect the dates, although it was about the 13th of August, 1906; that some of the 10,000 ties he bought from Moore were shipped, and some of them came from Thompson; that he does not know just how many ties the $682.80 given to Thompson represented, nor does he know just how many ties were represented by the check for $277. which he gave Moore, but that he knows this check was given for white oak ties that went to the B. & O. Railroad; that the Thompson check was given in payment for ties that went to the defendant; that he did not buy any ties from Thompson, but was buying them from W. V. Moore; that Moore was buying the ties from Thompson; that he never represented to Thompson that he was buying the ties from him as agent for the railroad company, and never knew that any such claim was made; that he remembers

that Thompson attached for the protested check, but not because he had represented himself to be the agent of the company; that the white oak ties which he got from Moore and shipped to the B. & O. Railroad were no part of the 10,000 ties which Moore was to let him have for the defendant; that he had another arrangement with Moore by which he was to let him have other ties besides these 10,000, such other ties being white oak and mixed oak of different sizes; that he never made any provision for the payment of the protested check to Moore of $277; that he was going to get ties from Moore to ship defendant under his contract to
38 deliver ties, and that he had all the 10,000 which Moore had agreed to let him have. He also testified that he did not remember Mr. Preston's having told him of Mr. Masterton's saying that, notwithstanding he had ties offered to him at a lower price, he wanted to pay him (witness) the contract price if he (witness) would ship in the ties, and was willing to do it; that he would not say Mr. Preston did not tell him this, but that he didn't think he did; that there was no delay on his part in shipping the ties; that after Mr. Masterton agreed to let him go ahead with the shipments, "I immediately ordered the cars in the places where I had the ties"; that he did not reply to the defendant's letter of October 26th stating that he had not put the railroad company to any delay; that there was no delay on his part, and that he "Hadn't been putting them to any delay"; that six days before the letter of October 26th Masterton had told him that he wanted 15,000 ties right away, and that he had the cars placed to ship the ties in as soon as possible; that the company did not place the cars until he (witness) ordered them. In answer to a question concerning a statement (in the defendant's letter of October 26th) that he had been delaying shipment of ties, and that it did not want any further delay, testified that he had never been allowed to ship the ties; that Masterton never accused him of delaying the shipment of ties, except in the letter of October 26th; that his letter of October 27th was the only reply that he ever made to Masterton's letter of the 26th of October; that at the time he ordered the cars placed he had the 15,000 ties in different parts of Virginia; that he was going to have the cars
39 placed at Vienna, Dunn Loring and Greeley; that he didn't want them placed everywhere at once, because one inspector couldn't load everywhere; that when the defendant would not let him ship the 15,000 ties, he thinks he sold some to Mr. Preston, and shipped some to New York, Newark, N. J., and probably some to Philadelphia and Baltimore, but he does not remember how many; that he thinks he sold one or two car loads to the Bates Equipment Company; that when the defendant refused to accept any more ties from him, he had these ties coming out, and in order to live up to his contract with the people from whom he was getting them, he had to go and sell these ties in New York; that at the time he made the contract with the defendant, all his other contracts were practically filled; that he might have had an unfinished contract, or something like that; that he agreed to ship defendant 15,000 ties a month, and after that he did not make any more contracts; that he

had all he could attend to to attend to that; that he had no contract with the Bates Company at that time; that he never had a contract with the B. & O. or the United Railways Electric Company, although he might have had an order from them; that he never shipped any ties to either of them after October 27th; that all the ties he shipped to them was ending up about the time he made the contract with the defendant; that the 10,000 to 15,000 ties which he had on November 19, after his discharge in bankruptcy, were at Widewater and Greeley, Virginia; that some of these ties were the ties mentioned in his letter of October 27th; that the ties referred to in his letter of November 19th were the same ties to which
40 he referred in his letter of October 27th; that he turned those at Widewater over to his trustee in bankruptcy, and that in these ties he thinks he had a profit of twenty-three cents in those which were his own, and sixteen cents in those which he got from Mr. Lee; that by the use of the expression his own ties, he meant those which he cut with his own mill; that about 5,000 of this lot of ten or fifteen thousand ties he got from Mr. Lee; that about two or three thousand were in the Shackleford lot, and probably a couple of thousand in the Matthews lot, and probably not over five or six hundred in the Moore lot; that probably a couple of thousand were his own ties; that these 2,000 ties of his own he had ready to deliver the defendant on the 27th of October; that these ties, some of which were at the wharf in Alexandria, are included in the 3,276 ties scheduled in his petition in bankruptcy; that these ties were not attached at the time he was ready to ship them; that he assigned these ties to R. S. Matthews the 30th of July; that the ties in Stafford County, ready to ship to defendant, were not attached; that these Stafford County ties were not scheduled, because they had not been paid for, and he did not consider them his; that he had not paid for these Stafford County ties, or the labor on them, and does not know where they are now; that these relate to two thousand of the fifteen thousand he had to deliver. He also testified that he and Mr. Miller (an attorney in the offices of Douglass & Douglass) were a day or two getting up his schedule, but that he does not remember just how long; that he does not remember whether they were getting it up at the time he wrote his letter
41 of October 27th or not, and does not remember whether he swore to it in the morning or in the afternoon; that he knew Mr. Matthews (another attorney connected with the firm of Douglass & Douglass) went over to Baltimore, but that he did not know he was going; that he does not remember the day or the time that he went; that he did not know of any conversation between Mr. Douglass and Mr. Gosnell over the phone on October 30th, and did not know that Mr. Douglass was going to make a proposition to withhold his contract with the defendant from his schedule, provided the defendant company would agree to make a new agreement with him after his bankruptcy proceedings for the undelivered ties; that he does not remember anything about this proposition, and that he never asked Mr. Douglass to make any such proposition for him; that Mr. Douglass never told him that he could

not make any such arrangement; that he practically left everything in Mr. Douglass' hands; that he received the letter which Marbury & Gosnell wrote him in reference to the proposition made by Mr. Douglass, and that he went and showed this letter to Mr. Douglass, and told him that he never authorized him to make any such statement, to which Mr. Douglass replied, "That is the best way to do it", or something like that; that of the 20,000 ties, about, which he shipped to New York, some of them were ties which he had intended to deliver to the defendant, but that he does not know how many; that he did not sell any of these 10,000 or 15,000 ties intended for the defendant to anyone except the Bucks Company in New York; that he never sold any of these ties at a higher price than he was to get from the defendant; that the fifty-seven cents which he got for them was less the water and rail freight;
42 that he actually sold these ties at a less price than he would have gotten from the defendant had it taken them; that after the defendant would not take these ties he went on to New York to see if he could sell them there, and the best price he could get was fifty-seven cents; that the ties were shipped by rail to Alexandria, and by water from there to New York, and the freight amounted to about twenty-five cents; that he does not know where the bills are that would show what the freights were, and his books are in Rhode Island, where he is now engaged in business; that according to the book he has in court the vessel freight was eleven cents per tie, plus loading, wharfage, and so on; that he does not know what became of the Moore ties after he did not get any more, and does not know whether Mr. Preston bought them or not, or how many he (Mr. Preston) bought; that he does not know whether Mr. Moore had 10,000 ties there or not, but that he knew he had made several agreements with Mr. Moore, and that he had always done just what he said he would do, and that he expected him to do the same thing in this case; that he had agreed to sell him ten thousand ties for this contract (with the defendant), and that he had no doubt but what he would have done so had he taken them from him. He further testified that he got up a schedule somewhere about August or September, but for no other purpose than to show Douglass & Douglass how his assets and liabilities stood; that he did not use this same schedule without change for his bankruptcy proceedings that at the time his schedule in the bankruptcy proceedings was prepared, he probably owed some of
43 the same parties that he owed at the time he prepared the former schedule to show Douglass & Douglass his assets and liabilities; that in his subsequent schedule he might have used the list of debts which he contracted, as shown in the first schedule prepared along in August. He testified that the ties which he bought from Thomas B. Simmons were white oak and mixed ties, some of which went to the B. & O. Railroad Company, the mixed oak ones went to the dock in Alexandria which was one of his accumulating points, and where he usually had from one to fifteen thousand on hand; that he does not recall the date when he purchased these ties; that Simmons sued him for these ties; that he did not know that

he had been sued for the ties until some time afterwards, and then he sent his inspector down to inspect and pay for them; that they came to about $537, and the check which he gave for them came back protested about the same time the others did; that as he had not moved any of these ties Mr. Simmons agreed to take the ties back, and call the deal off, and this was done; that the suit against him by Simmons was brought some time afterwards "claiming some kind of damage for rejected ties" that he had rejected of his in Alexandria; that he never knew that the suit brought by Simmons had been answered by him; that Mitchell & Diggs never represented him, but were counsel for W. Y. Southerland to whom he (witness) had sold certain ties down the river; that he knows nothing of any case appealed in his name to the Court of Appeals of Maryland for these ties any further than that Sutherland sued Simmons "for ties that he took of- the bank, that I had sold to Sutherland"; that he thinks "Mr. Sutherland brought the suit in my
44 name"; that he was only summoned down there (to the court) once, and that was to testify that he had sold these ties to Mr. Sutherland, and that he had been paid for them; that he never employed any counsel down there, and never had any talk with any one further than about the matter of his testimony; that he never employed Mr. Adrian Bush; that he was the attorney for Mr. Sutherland, and that he never saw him more than twice in his life; that he does not owe for a one of these ties; that he does not know whether Mr. Simmons is scheduled or not, "I know that I did not take a one of the ties that he had counted up and inspected for him on the bank of the river, because the check was protested. I didn't think I owed him anything. That is why I didn't schedule him, I think. That was the agreement, that I would take the check back and he would take his ties back, and call the deal all off"; the wages, according to his schedule, which he owed at Widewater, Virginia, he has paid, but that he does not recollect the amount; that some of these Widewater ties he is claiming for, as they would have gone to the defendant company if it had taken them. He further testified that he owed seven or eight thousand dollars for ties, according to his schedule, but that it was not all for ties which would have gone to the defendant company; that a great many of these ties are now involved in this controversy; that the seven or eight thousand dollars which he owed was for ties and lumber, and other material; that his contract price with Moore for ties was thirty-eight cents, and the freight was twelve cents; that the rate on the Moore ties was eight cents per hundred pounds, and the rail-
45 road company estimated their weight at one hundred and fifty pounds each; that on the Lee ties the rate was six cents per hundred pounds, and they were estimated at one hundred and fifty pounds per tie also, which would make, freight nine cents per tie; that on November the 19th either his aunt or the bank would have financed his business; that he had made arrangements with both his aunt and the bank to do this prior to his bankruptcy; that when the attachment proceedings came on he went to see his aunt, and she agreed to let him have $5,000. and accept his note therefor;

that his aunt had $5,000. in cash, and about eight hundred dollars worth of real estate—it was taxed at $800, and she lived with her sister; that his aunt's real estate was at North Kingston, Rhode Island, and he thinks she had a little more than $5,000; that he does not know what his aunt said she had, but that he knows she has more than $5,000; that he does not know how much cash his aunt has, but that she did let him have some money; that she was going to let him have $5,000 to finance his contract with the defendant company, if he needed it; that she was willing to let him have this money because he had "a contract and wanted to carry it out"; that he "could have made a good profit on the contract"; that notwithstanding the money which he owed, he could have carried out the contract; that the contract under which he was to get 30,000 ties from Mr. Lee was made about April 11, 1906, but never began to deliver until somewhere in June or July; that of these Lee ties he made shipments on June 4, 16, 20, 28, 29, and on July 3rd and 23rd; that the three cars shipped June 4th went to Alexandria;

46 that his contract with Moore was to furnish him 30,000 chestnut ties about eight feet long; that these were standard ties in some parts of the country, and in some parts not; that the Bucks Company used all sizes; that the ties called for in his contract with the defendant are considered standard ties up around Boston, but not in New York or Washington; that he does not think it is a standard tie in Maryland; that the defendant company was not buying 75,000 standard ties, but of the size that it wanted; that standard ties in Maryland are seven by nine, and eight and one-half feet along, for steam roads; that he thinks standard ties for trolley roads are considered, in Washington, six by eight.

Q. You say you bought from Shackleford 8,000 ties to be applied to our (meaning the defendant's) contract? A. Yes.

Q. How was it you made that May 7, 1906, and did not make any contract with us (meaning the defendant) until June 16th? A. In May I had bought ties of Mr. Sh*ea*kleford, and after I had made this contract with your people (meaning the defendant) I went down and made another agreement with him that he was to ship so many ties, certain sized ties for this contract, the same as I did with Mr. Lee. After I made this contract with the company, I made this contract with these parties.

He further testified that before making the contract with the defendant he contracted with these parties to take what ties they had,

47 and that he intended to sell them to whoever he could; that on April 11th he contracted for all the ties Mr. Lee's place would cut, and that after making the contract with the defendant he contracted with Mr. Lee to furnish him 30,000 ties for this contract; that he bought all the ties that Mr. Lee's place would cut, without knowing how many it would turn out; that he does not know how many the lot turned out, but would say thirty to forty or fifty thousand; that after he could not take any more of the ties, Mr. Lee sold them to other parties; that he went over Mr. Lee's place several times, and he thought it would cut from thirty to fifty thousand ties; that he had some trouble with Mr. Lee, about

paying for these ties, in July, 1906, but it was only because Mr. Lee wanted him to advance some money for ties that were lying on the ground, and he did not wish to do so, because under his agreement the ties were not to be paid for until they were delivered on the cars; that this was some time between July and October, and that he never got any more ties from Mr. Lee after that time; that Mr. Lee never offered him any more ties f. o. b. cars after July 30th; that Mr. Lee did not assign as a reason for not doing so the fact that he had refused to make advances for ties lying on the ground, but because, he said "my things had been tied up, and Mr. Preston had been down and offered him more money for his ties, and he sold them to Mr. Preston"; that this was sometime after July 30th, after making the last shipment; that he was not in position to accept any more ties after that; that Mr. Lee assigned as a reason for selling the ties to someone else, that the ties were there and he wanted them moved, and that if he (witness) didn't move them he would sell them to somebody else; that Mr. Lee wanted
48 him to pay for ties that were on the ground, but that he would not make advances for the ties until they were put aboard the cars according to the contract; that he does not think these ties were attached, but does not know whether any of Mr. Lee's ties were attached or not; that Mr. Lee never told him of any attachments, and he never heard of any of those ties being attached as belonging to him (witness); that he does not recollect giving any bond to have any attachment on these ties released; that the prices which he was to pay for the ties from Moore, Lee and others were f. o. b. cars in every instance; that he believes Mr. Moore bought the ties which he was to let him have from farmers, lumbermen, and sawmill men. He further testified that he bought 5,000 ties from Mr. Matthews, and that he had a contract with Mr. Matthews to furnish him some mixed ties; that he agreed to take all the mixed oak ties Matthews could furnish him until he notified him to the contrary; that the 3,276 ties which he got from Matthews were mixed oak ties, and are no part of the ties on which he is now claiming his profits from the defendant; that these 3,276 mixed ties, for which he owed Matthews $1,005, he (witness) had at Alexandria and on cars, and that he assigned these ties to Matthews on August 16, 1906; that he never got any more ties from Matthews after that; that the ties which he got from Wesley & Light Company, of Stafford, came to his dock in Alexandria, and from there he shipped them to New York and Newark; that these ties have not been paid for; that Mr. Stunnell, in Baltimore shipped a carload or two of these ties to the defendant company, and he
49 laid an attachment for them in Baltimore; that all the rest of these (Stafford County) ties came to his dock in Alexandria; that the 1,004 ties which he owed Stunnell for, are a part of the ties for which he (Stunnell) attached in Maryland; that the 968 ties which he got at Sunderland Crossroads, Maryland, went to Long Island, New York; that he partly paid for these ties, but thinks there is still due on them about $387.20; that none of the ties which he bought from Master's was to go to the defendant, they

all went to New York; that he had no other contracts to deliver ties running between July and August, besides his contract with the defendant; that he thinks the B. & O. agreed to take a certain number of the chestnut ties that he intended to ship to the defendant, and that it was the B. & O. to which he referred in his letter in reply to the defendant's request for him to "ease up" shipments; that more than half of the 10,000 ties which he bought from Masters, in Fredericksburg, Virginia, between July 23rd and August 3rd, went to New York or Newark; that these were mixed oak ties as to quality, but were the same size; that the $1,329 put down in his schedule was the balance he owed on them; that he bought 8,000 ties from Shackleford, and delivered about 1,525 to the defendant; that he does not remember whether the 1,100 ties scheduled at $371 as due Shackleford are a portion of the 1,525 or not; that (after referring to his ledger) they are a part of the ties which he shipped to the defendant; that he got the switch ties from Mr. Herbert Wingfield; that he knows Mr. Wingfield attached, but that he does not think he attached for the switch ties that he shipped to the defendant; that he paid for the switch ties, and Mr.
50 Wingfield attached for some other ties which he had bought from him after he (witness) had made the contract with defendant; that he paid Mr. Wingfield $903.10 in the attachment proceedings in Baltimore for these switch ties; that on July 18th, he paid Mr. Wingfield $1,500 for a lot of ties and switch ties that had been loaded that week, and a little later gave him a check for $156.88; that the switch ties were shipped on August 2nd; that possibly the switch ties were included in Mr. Shackleford's bill, for which he attached in Baltimore; that he could not say positively; that he paid Shackleford about $1,100 after giving him the check for $1,500; that he does not think he gave Shackleford any check after July 25th; that the $85.56 scheduled against Mr. Shackleford was for freight charges which Mr. Shackleford had not given him credit for.

On redirect examination:

That at the time of his bankruptcy, he had no ties on hand for which he had paid that he did not turn over to his trustee; that he had no ties as his property, for which he had paid, that he did not put in his schedule; that he scheduled everything that he owned; that he never authorized Mr. Douglass to make a proposition to the defendant to cancel his contract, or anything like that, "I just authorized Mr. Douglass to try to get them to allow me to go ahead and ship ties on the contract. That is what I told Mr. Douglass. I never told him to cancel the contract, or anything like that."

51 Q. He was not your attorney to make any such proposition as that? A. He never had my permission to do anything like that; no sir.

Q. Did Mr. Douglass subsequently bring to your attention the fact that he had made that proposition? A. He did.

Q. What did he say? What did he do? A. I went over to see Mr. Douglass. He told me that they would not have anything to

do with it, and I told him I was glad of it. I says, "If they ain't going to take them now, they might as well not take them later on."

He further testified that the twenty thousand ties which he shipped to New York, and for which he got fifty-seven cents, cost him to deliver them in New York, including wharfage, freight, loading, insurance, and commissions, sixty-two and one-half cents per tie; that although he got more for them than his contract price with the defendant, yet his having to ship them to New York caused him an actual loss of five and one-half cents per tie; that these 20,000 ties would have been available to carry out his contract with the defendant, had it allowed him to deliver them; that "The ties were got out for the W. B. & A. people, but when they would not take them any more I had to do something else with them to keep them moving from the people I had contracted with; and that was the best I could do"; that the attachments in Virginia were all dismissed, he believes, when he went into bankruptcy, as well as he knows of;

52 that at that time all of his affairs were in the hands of Douglass & Douglass, and they were looking after those matters for him; that his contract with Mr. D. M. Lee did not require him to make any advances upon the ties he was to get from him until they were loaded on the cars; that his contract required him to pay for these ties when they were loaded on the cars, and that he was willing to do at all times; that after he made the contract with the defendant, it was his intention to fill it with the ties embraced in the contracts which he had with Messrs. Lee, Shackleford, Matthews and Moore.

HERBERT WINGFIELD, being first duly sworn, testified:

On direct examination:

That about July, 1906, he sold Henry N. Girard about 50,000 feet of switch ties, to be delivered as called for; that he actually delivered between thirteen and fourteen thousand feet, to the best of his recollection, the amount received by the defendant; that his contract with Girard was a verbal one, and that Girard was to pay him $22. per thousand feet for said ties delivered to the defendant; that Girard could have gotten the remaining thirty-six thousand and odd feet from him.

On cross-examination:

That the switch ties were to be delivered to the defendant, possibly at Baltimore and Odenton, but that those delivered were actually

53 delivered at Odenton, he thinks; that the ties were shipped, he thinks, from Barboursville, Virginia, although he may be mistaken about this, as he was to ship them from various points; that the freight rate from Barboursville to Baltimore and Odenton was the same; that he could not say whether they were standard switch ties or not, although he thought they were; that the $22 per thousand feet was the price of the ties delivered at Baltimore or Odenton; that on August 23rd he filed attachment proceedings against Girard, in Baltimore, to recover about $903.10; that

this amount was for other ties which he had sold Girard; that he thinks the switch ties had been settled for previously; that the switch ties were shipped on August 4th, 1906, and the $1,500 check given him by Girard on July 18th, 1906, would seem not to have included the switch ties; that he has only his memory to go by, and from the record he thinks the attachment proceedings, in Baltimore, probably included the swtich ties; that his agreement with Girard to furnish him these ties was verbal, and he presumes it was made about the time Girard made the contract with the defendant; that he could find no letter or record in his office bearing on the subject; that he does not remember whether at that time Girard made an arrangement with him for a specific number of thousand feet, but thinks he told him he wanted him to furnish the switch ties that the defendant required; that he does not remember now just how many were required, but that he knew at the time, of course; that he shipped the ties as they were ordered; that he shipped two cars on August 4th, and that on August 23rd he filed attachment proceedings in Baltimore against him to recover $903.00; that
54 Girard never ordered any more ties from him after the attachment proceedings.

WILLIAM V. MOORE, being first duly sworn, testified:

On direct examination:

That his first sales of ties to Henry N. Girard began in 1905, and went on up into 1906; that in 1906 he had a special agreement with him to furnish him as many as 10,000 chestnut ties at thirty-eight cents, f. o. b. cars; that he does not remember how many of these ties were delivered to the defendant, but he remembers one shipment; that this special agreement for the 10,000 ties was made about the time Girard made his contract with the defendant; that Girard gave him that reason for wanting these ties specially.

On cross-examination:

That his business is acting as agent for machinery, and lumber business; that he has been in the machinery business for twenty-odd years, and has been in the sawmill and lumber business for the last eighteen years, off and on; that he was located at Falls Church, Virginia, in 1906; that it was at West End, Falls Church, that Girard made this arrangement with him; that he did not have the timber growing on his own land; that "I buy from different mill men, and frequently take it in on my deals, selling sawmill outfits, would take so many ties along on the deal; that it was a
55 "kindof trading"; that other times he was buying them (ties) all along that road, at Vienna, Dunn Loring—"I had charge of that line in behalf of Mr. Girard. I was buying them up for him along the line"; that he does not recall how many ties he supplied, but that he was supplying chestnut ties, standard oak ties, and mixed oak ties, and was shipping from various points at various times; that he did not cut them, but bought them from the mill men, delivered to the railroad, and paid them so much; that the

chestnut ties were specified standard trolley ties, eight feet long; that he never heard of any standard more than eight feet, though some demanded eight feet, two; that he furnished Girard practically all the ties he got, although he possibly sold the B. & O. a few car loads of standard white oak ties, through its agent; that he does not recall how many ties he delivered to Girard, but recollects one shipment of 1,945 ties that he shipped to the defendant; that the balance of the ties which he did not deliver to Girard, and which he (witness) had bought and paid for, and agreed to take off that road, he had to dispose of otherwise: that Mr. Girard could have gotten twice the number of ties from him that he contracted for, had he wished to, and that he had sufficient to supply him; that he was getting ties from various men, up and down the road; that he did not sell Girard any more ties after he went into bankruptcy, November 5th, 1906; that he only recalls one carload of ties that he shipped afterwards, and they were mixed oak ties; that Girard paid him thirty-eight cents f. o. b. cars, and the ties were shipped from Herndon.

Wehl, Vienna, and some from Dunn Loring; that the freight
56 rate was about three cents a hundred, and the ties were estimated to weigh from 150 to 165 pounds, somewhere along there; that Girard gave him one check for $277 on August 13th, 1906, that went to protest, and that he has not received any dividend on account of it; that he is perfectly sure that he never supplied Girard any more of those ties after he went into bankruptcy, November 5th, 1906.

On redirect examination:

That after he went into bankruptcy, Girard never asked him to sell him any more ties.

ARTHUR P. FORBES, being first duly sworn, testified:

On direct examination:

That he was employed in the National City Bank throughout the year 1906 as note teller, and that in July and August of that year Henry N. Girard got the following discounts at that bank:

A loan,	July 17	$4,000.00
	July 23	1,500.00
	July 25	275.00
	August 9	2,500.00;

that all these discounts have been paid, and they were all the discounts he got there during that year.

57 On cross-examination:

That, except the one of August 9th, all the discounts were paid on October 19, 1907; that some small payments were made on account of these discounts before the final payment; that $150.51 was paid September 26, 1906, and $95.92 was paid October 10, 1906; that he does not remember about these small payments, where the money came from, or who paid it; that the final amount of $4,200 was paid by Douglass & Douglass, in whose hands it had been put for collec-

tion, in October, 1907; that he does not know that the bank held the contract between Girard and the defendant as collateral security, but knows that it held some bills of lading, or duplicate bills of lading, for railroad ties; that these were held as security for the amounts then due; that he never saw Girard's contract with the defendant, and would not necessarily have known it if the bank had held it.

PHILLIP WALKER, being first duly sworn, testified:

On direct examination:

That he was a member of the Bar of the District of Columbia; that he was connected with the Washington office of the Title Guarantee & Surety Company in 1906, and that his duties in this connection were to execute bonds for it, and to approve bonds and other judicial matters before they were executed; that in 1906 his company executed certain bonds, upon the application of Henry N. Girard, by which certain attachment proceedings against him (Girard) in Bal-
58 timore were dissolved.

On cross-examination:

That Mr. Harley was attorney in Baltimore for the Surety Company, and the execution of the bonds passed through his hands; that the Surety Company gave another bond for $700 to protect the W. B. & A. in the matter of a claim made by Thompson against Girard; that this bond ran directly to the railroad company, but the others were bonds in judicial proceedings; that the $700 bond was given to release some $700 or $800, because of a notice to file a lien by Thompson against Girard; that after this bond was given the money was turned over to Douglass & Douglass; that the money which came by giving him the dissolving bonds was paid to Douglass & Douglass, and deposited in the National City Bank to the joint account of Douglass & Douglass and the Title Guarantee & Surety Company, and when the cases were finally closed in Baltimore the Surety Company withdrew any claim to the money; that the Surety Company never had to pay out any money because of its having gone on these bonds; that the attaching creditors were paid out of this special deposit; that the National City Bank got some of the money, but he did not think it got all that it claimed; that the suits in Baltimore were dismissed with the consent of the Surety Company, because by the dismissal of the suits it released its liability on the dissolving bonds; that he could get them released by the bank's paying to the attaching creditors a certain percentage of their claims; that he does not re-
59 member how much this percentage was, but that he thinks the bank was pretty nearly whole on its claim; that he knows when the attaching creditors filed their claims they filed them for much smaller amounts than they had attached for; that he does not think the bank paid them more than $400 or $500 to settle the whole thing; that there was litigation in the courts as to whether the attachments were dissolved by the bankruptcy, and, secondly, whether the bonds were liable under the circumstances; that he knew at the

time how much money the bank paid the creditors, and his recollection was that it was about $500.

On redirect examination:

That he had no personal knowledge of the state of the account between the bank and Girard, and did not know the state of Girard's account at the bank now; that he did not recollect when the money was deposited to the joint account of Douglass & Douglass and the Surety Company.

SARAH MCCOMB, being first duly sworn, testified

On direct examination:

That she was 61 years old, resided in Lafayette, Rhode Island, has known Henry N. Girard well for about ten years, and that she was an aunt of Henry N. Girard's wife; that her relations with Girard had been friendly during the last ten years; that she was acquainted with Girard in 1906 when he was at Widewater,
60 Virginia, engaged in cutting and shipping ties; that she recalled a conversation which she had with Girard prior to the middle of June, 1906, with reference to a contract which he had to furnish ties to the Washington, Baltimore & Annapolis Electric Railway Company; that at the time of this conversation she told Girard if he needed any assistance in carrying out the contract she was willing to let him have it; that at the time of this conversation he said he might require $5,000, or less, not more; that she told him she would let him have $5,000, supposing she was secured with good security; that she would have been willing to let Girard have $5,000, and take his note for it, but that she was not called upon by him to furnish this money; that she was in a position to let Girard have the $5,000, as she had the amount in bank.

On cross-examination:

That she was unmarried, and had lived in Rhode Island all her life; that she never visited Girard while he was in business in Virginia; that she does not recollect just when Girard went into business in Virginia, but thinks it was in 1906, during which year she does not think Girard visited her in Rhode Island more than once; that she has more than five or six thousand dollars worth of property, but that is the bulk of it; that her property consists of cash; that she had it on deposit in 1906 and has so had it ever since, and that it is drawing interest; that she has about $800 in the People's old Savings Bank in Providence, and $5,000 in the Putnam Savings Bank; that she has some real estate in Lafay-
61 ette which is taxed at $800.00; that she has no other property besides this and the money which she has on deposit; that she never had any correspondence with Girard with reference to letting him have this money, and does not remember to have had but one conversation with him on the subject prior to the one which she had with him after he finally left the South and came home after giving up his business there sometime in the fall of

1906; that she does now know when the contract of Girard's was made, but if he wanted her assistance she "was perfectly willing to let him have it"; that while Girard was in the South he wrote to her, and she wrote him she was willing to assist him if he needed it; that she did not have his letter as she was not in the habit of keeping such things; that she and Mr. Girard exchanged about two letters on the subject she thinks; that he was not in Rhode Island at the time and she did not talk to him on the subject; that she told Girard in her letters she would let him have as much as he called for; that she does not remember the year these letters were written, because she never expected to have to answer these questions; that she wrote them she thinks about a year before he went into bankruptcy, but that she does not know what year he went into bankruptcy, but thinks it was in 1908; that she was willing to help Girard because she thought she could offer it to him, he being her relation, and to get security for the money; that she did not know of any other contract; that she never offered to settle with Girard's other creditors; that she knew very little about Girard's business; that she knew his property had been attached in
62 Baltimore; that the property was attached in Baltimore before she offered Girard her assistance; that she knew Girard was in debt; that he had been attached and everything taken away from him, as she understood, although she knew very little about it; that she was willing to help him out on this contract because she thought it was very good paying business for him; that this was not after the bankruptcy, but she didn't think much about the bankruptcy; that she does not know anything about the contract between Girard and the Washington, Baltimore & Annapolis Electric Railway Company; that she does not know whether it was partially performed at the time of her agreement to help Girard; that she does not know anything at all about it; that she thought the contract with the Railway Company, the defendant, had been made when she made the agreement to help Girard; that she never discussed this contract with Girard; that she offered to help him on this contract simply because he wanted money, not that she wanted to help him on any particular contract; that she simply wanted to help him if it was necessary; that she was friendly with him, his wife's relation, and simply wanted to help him; that she did help him in 1907 or 1908.

On redirect examination:

That while she does not remember the exact time when she agreed to help Mr. Girard in this contract, she knows that it was during the year that his property was attached in Baltimore; that she has no way of fixing the time, except by the attachments;
63 that Girard mentioned to her at that time the valuable contract he had with the Electric Railway Company, and told her that he could make something out of it; that he, Girard, wanted her to put up some money for him if he required it, and that she agreed to do so; that at the time Girard came to see her from Virginia he told her about having this contract; that at this time

she agreed to help him to the extent of $5,000 if he needed it, and that the correspondence which she had with him was to the same effect; that she didn't know anything about the character of the contract, and didn't enquire into it; that Mr. Girard mentioned having the contract and that is all she knows about it; that it was with reference to this contract she was willing to help him, and she had the money in bank to do it with.

On recross-examination:

That if she had known Girard was going into bankruptcy she didn't know whether she would have helped him or not, but that she thought she would; that if she had good security she would have let him have the money at any time to that amount, meaning the $5,000; that she simply wanted to let him make a new start; that as she understood it he was all tied up in financial difficulties.

Q. You didn't know anything about this contract? A. I didn't know anything about this contract, before he went into bankruptcy. When he went into bankruptcy, then I knew little enough about it—very little. He didn't let me know anything about it. He was a bad boy.

Q. And you simply wanted to give him a new start; is that
64 it? A. I simply wanted to help him out.

On re-redirect examination:

That by security for the money she meant she would have been willing to take Mr. Girard's note; that that is what she meant by security; that the understanding which she had with Girard to help him was after he had attachments against him in Baltimore; that she knew about these attachments; that it was after she learned of these attachments that Girard came to her and told her that he had this contract with the defendant company, and wanted her to help him out with reference to this contract if he required it; and that it was with reference to that contract that she agreed to let him have $5,000. if necessary.

Whereupon, the defendant to maintain the issues upon its part, introduced the following testimony:

WILLIAM H. POWELL, being first duly sworn, testified:

On direct examination:

That he was a member of the Bar of the City of Baltimore; that in October, 1906, he was a clerk in the law offices of Marbury & Gosnell, Baltimore; that he was managing clerk for that
65 firm, and has been with the firm since its formation on July 1st, 1903; that during the summer of 1906 he formed the acquaintance of Mr. William B. Matthews, Jr., who was connected with the firm of Douglass & Douglass, of Washington; that Mr. Matthews called at his office on the 30th of October, 1906, to see the member of the firm who had charge of the Girard matter; that he (witness) had charge of the office, and it was his duty to receive

the persons who called, and do what he could to aid them in taking matters up with members of the firm; that at that time (October 30th) Mr. Gosnell was in the Court of Appeals at Annapolis, and he so told Mr. Matthews; that he told Mr. Matthews if he wanted to convey any message to Mr. Gosnell, he could do so through him, that being a part of his duty as managing clerk; that Mr. Matthews then said "they wanted the electric company to cancel the then existing contract, and after Mr. Girard was discharged in bankruptcy, make a contract anew with Mr. Girard as to the then unfilled portion of the existing contract." That he communicated this to Mr. Gosnell when he returned to the office.

CHARLES F. GLADFELTER, being first duly sworn, testified:

On direct examination:

That he was the Secretary and Treasurer of the defendant company, and had been connected with the defendant for several years; that he practically negotiated the making of the contract
66 between Girard and the defendant; that Mr. Masterton, who signed the contract as Secretary, was at that time Secretary and Treasurer of the defendant company, the position which he (witness) now holds; that at the time he negotiated the making of the contract he was Secretary to the President of the company; that Mr. Masterton was now abroad and not officially connected with the company, and had not been an officer of the company since July, 1907; that he recalls that this case was set for trial two or three months ago; that at that time Mr. Masterton was here ready to testify; that he (Masterton) came from Cleveland for the purpose; that the case was not reached for some cause or another at that time; that he knew Mr. Girard; that he recalls the attachments that were laid in the hands of the defendant, and that Girard made no shipments of ties to the defendant company after that time; that the defendant made several efforts after that time to get Girard to ship ties—after the attachments were dissolved; that he remembers the giving of the dissolvment bonds, and that he got up the vouchers for the payment of the money; that the money went to Douglass & Douglass and the Surety Company, and the National City Bank; that within a few days after the attachments were dissolved he was to order the vouchers forward together with the money to Washington—as soon as he could get up the vouchers; that he recalled an item of $700. that was retained at that time to cover, according to his recollection, a claim made by Mr. Thompson; that he did not pay over this item until the bond was given to the company; that he thought it was in September that Girard first took up the question of delivering all the undelivered ties after the at-
67 tachment proceedings; that he does not think Girard delivered any ties in September or October; that he was familiar with the construction, and was over the road constantly; that the company needed ties in September and October, and made demands upon Girard for delivery of ties along about that time, but that he did not deliver any; that Mr. Preston made the company an offer of ties along about that time, but that the company did

not make a contract with him, because it considered itself bound by the Girard contract, and expected to carry out its part of that contract; that the company considered itself bound by the Girard contract until after the bankruptcy proceedings—up to the bankruptcy proceedings; that the price at which Mr. Preston offered ties to the company was fifty-five cents, the same price as the Girard ties, except that for some of the ties Girard was to get fifty-nine cents; that the company was offered ties at fifty-five cents by outsiders, for which it was to pay Girard fifty-nine cents, but that the company would not accept these offers from other people at the lowest rates; that he considered the ties standard trolley ties, and that his road runs between Baltimore and Washington 35 miles, double tracked to the District line, and from Annapolis to the Junction, 18 miles; that after Girard went into bankruptcy the defendant company took up the question of purchase of ties from other people, and that it paid 55 cents, the same price that Girard specified in his contract as to certain points of delivery; that as he recalled they came from the same points of shipment, and were 55 cents f. o. b. cars Odenton;

68 that 55 cents seemed to be the market price during September and October, and the succeeding months, but that he was not connected with any other company buying ties about that time; that the company's first order for ties after Girard's bankruptcy was for 10,000 from Mr. Preston, f. o. b. cars, Odenton, at 55 cents; that the next order was for 5,000 from the same person at the same price; that later on there were other contracts made for the same price, and same delivery, aggregating possibly 20,000, in addition to the 15,000 embraced in the two previous orders, making about 35,000 in all; that the defendant bought about as many ties on the outside after Girard went into bankruptcy as were undelivered under his contract; that the defendant purchased switch ties at Annapolis after Girard failed to deliver them, and the same as Girard's contract price, $24. delivered; that they were of the same dimensions and quality as called for by Girard's contract; that in speaking of the ties gotten from Girard as standard ties, he meant for trolley line construction; that other companies in the vicinity were using, "generally speaking", the same kind of ties, and that the price paid therefor, as he recalled, was the prevailing price around about September up to November, 1906.

On cross-examination:

That in September and October 55 cents was the prevailing price for the class of ties that the defendant was purchasing; that the difference in the price of the ties mentioned in the contract (some

69 being 55 cents and others being 59 cents) was merely a difference in the freight rates, some being shipped from a greater distance than others; that Marbury & Gosnell were counsel for the defendant company, and advised him that so long as Girard was able to carry out his contract it must adhere to it, notwithstanding any offers made to it by other parties at lower rates; that the defendant company did not contract with, or buy any ties from, Mr. Albert Preston for the construction of its line until in November some time; that it did not, as a matter of fact, give Mr.

Preston an order for ties about the 4th of September that the 910 ties referred to in the letter of October 1st from Mr. Preston to Mr. Masterton did not go into the construction of the defendant's line; that the Traction Company paid for those ties; that it (referring to said letter) "says for the W. B. & A. Company. By way of explanation, as Mr. Gosnell has stated, the line of the Baltimore Terminal Company extends from a point in the shopping district to a point in Baltimore County, where it was to connect with the northern end of the line of the Washington, Baltimore & Annapolis Railroad. To facilitate the stuff, we had a certain portion of the ties delivered by way of Odenton and carried up over the tracks of the W. B. & A., to the point where it was connected with the Baltimore Terminal Company." He further testified that those 910 ties were bought by the defendant but paid for by the Traction Company; and he says: "I might add that we have about six companies in the construction of our lines here"—five or six different corporations with different names; that while it was not the intention, yet it would be possible, if he thought proper to do so, for him to pur-
70 chase any number of ties in the name of one company and have them used by another, and have no record of the company's having them that bought them; that the defendant company would not have been responsible for those ties, although Mr. Masterton, its Secretary and Treasurer signed the order; that it might raise a question of law; that the ties mentioned in the letter of November 6th went into the construction of the defendant's lines, and that this was probably the company's first order to Mr. Preston for the W. B. & A. construction; that the defendant's first order to Preston for its own construction was for 10,000 ties; that the defendant had no written contract with Mr. Preston further than the various letters indicate; that any contract between the defendant and Preston would have to be developed from the correspondence; that between the 6th of November and the 1st of January the defendant bought from Mr. Preston for its own construction about from 15,000 to 20,000 ties; that the defendant completed its road about the 1st of February, 1908, and that it was buying ties up to about as late as August or September, 1907.

X Q. Did I correctly understand you to say on your direct examination that you were purchasing from Mr. Preston the same class of ties exactly that you contracted to buy from Mr. Girard? A. As I recall, they were standard ties.

He further testified that the defendant was to pay Mr. Preston 55 cents for these ties delivered, irrespective of the shipping point"; that the ties were to be shipped from points in Virginia, but that he could not recall any of them; that they were not interested
71 in the shipping points, but only in having the ties delivered; that defendant sent its inspector to the point of shipment; that he does not remember where the inspector was sent; that that matter was entirely under their engineers; that these engineers are not now connected with the defendant company, and none of them are now here; that he was not the Secretary and Treasurer of the company at the time of the buying of these ties, but was assistant to the President; that he cannot say where the inspectors were sent

to inspect any of the 45,000 or 50,000 ties that were being bought to complete the construction of the defendant's road because it was not under his department at all; that the defendant purchased all the remaining ties, after Girard's bankruptcy, which it needed, at fifty-five cents per tie; that the demands by the company of Girard to deliver ties were by letters, and that he knows of no letters on the subject other than those filed in the record; that he recalls no special conversation with Girard with reference to delivering ties; that if any demands were made of Girard to deliver ties they must have been made by letter; that he thinks the defendant felt bound by the Girard contract until about the 1st of November; that he does not remember whether the defendant did not feel bound by this contract on the 27th of October or not; that at that time the defendant was represented by counsel; that he does not recall any party other than Mr. Preston from whom the defendant could have purchased the ties at a price less than that named in the Girard contract;

72 that Mr. Preston was the only party the defendant had in mind at the time; that the street railways in Baltimore use an 8½ foot tie, and that the defendant company uses a 4 feet 8½ inches tie; that with the exception of Baltimore and New Orleans the gauge of the defendant's line is the same as street railways; that steam railways usually use the 8½ feet ties—a somewhat heavier tie; that Mr. Girard failed to complete his order for switch ties at the time of his bankruptcy proceedings; that to his knowledge he never failed to deliver these switch ties until his bankruptcy; that Girard failed to deliver the other ties in September and October, when the defendant made repeated demands on him to deliver; that these demands would be shown by the letters; that he may be mistaken in using the word "repeated", but that if the letters showed, say, half a dozen demands that would be *repeated*.

On Redirect examination.

That the difference between a switch tie and a cross tie is that "the common cross tie, so-called, is used on straight line construction, straight track construction; but where a switch is constructed from a main track to a siding or a connection made between two main tracks, long ties are used in order to accommodate the extension and connect those tracks"; that where the track goes off from the main track, you have to take care of the situation where the tracks are widest apart; that he thinks the street railways in Cincinnati also have the wide gauge, but that all the others, to the best of his

73 knowledge, are standard gauge; that all the surface roads and interurban trolley roads have the same standard gauge; that he knew of no demands made upon Mr. Girard to deliver ties by Mr. Masterton or any other officer of the defendant; that that matter was in charge of Mr. Masterton at that time, who was the defendant's purchasing agent; that the defendant considered the difference between the 55 cent ties and the 59 cent ties as being the difference in the freight; that as he recalls, there were a number of ties shipped by Girard at 59 cents which the defendant reduced to 55 cents; that they deducted some 4 cents as an over-charge by

Girard; that Girard shipped the ties in as though they came from a point where he was entitled to a 59 cent charge when in fact he was entitled only to 55 cents; that the allowances were allowed by Girard as being proper overcharges; that he checked up the statement showing an overcharge on 4,296 ties from Mr. Girard's bills of account; that he settled with Girard on the lower rate because of the overcharges, according to the statement.

ALBERT PRESTON, being first duly sworn, testified:

On Redirect examination.

That he was dealer in railroad ties, and had his office at 621 Munsey Building, Washington, D. C.; that he had been in the railroad tie business twelve years; that he purchased his ties in Virginia and Maryland; that he knew Mr. H. N. Girard; that he was buying ties in Virginia during the summer of 1906, and at some of the places where Girard was dealing; that he practically dealt
73½ with the same people that Girard dealt with, although Girard might have dealt with some people that he (witness) did not; that he remembers he dealt with some people that Girard did not deal with; that all the people he dealt with were within a radius of one hundred miles of Washington; that North Garden, about 110 or 112 miles from Washington was the farthest point—just below Charlottesville, Virginia; that he saw the contract which Girard had with the defendant; that in September or October Mr. Girard wanted to assign his contract with the defendant to him—"At first he wanted me to pay him two thousand dollars, and afterwards we got down to a basis where I would pay him one thousand dollars if the company was willing for him to assign me the contract; and we got to a point where we made an engagement to go to Baltimore and see Mr. Masterton, to get him to sign the contract"; that this was subsequent to the attachment proceedings in Baltimore involving Girard's money; that the reason which Girard gave him for wanting to assign the contract was "Perhaps because he was not in a position to fill it. At that time he had not been adjudged a bankrupt and he did not want to make shipments in his own name to allow his creditors to attach the proceeds from these ties to be in the company's hands if he shipped the ties himself"; that this proposition came from Girard to him; that Girard never kept his appointment to go to see Masterton, but that he (witness) went to see Mr. Masterton several times about the matter on his own account, as he was very anxious to secure the business one way or the other; that Mr. Masterton told him that as long as Girard had the contract and could furnish ties they would be compelled to take them
74 from Girard, and that they would not enter into any contract with him direct; that he afterwards at different times communicated this information to Girard; that Girard acknowledged having several contracts at that time; that Girard was shipping ties to the B. & O. Railroad, the Philadelphia Rapid Transit Company, the Public Service Corporation, of Newark, and the Apex Equipment Company; that Girard had a contract with the Cranberry Coal Company to furnish ties which were to go to Baltimore,

but which he only partly filled; that *we* (witness) had a contract with him (Girard) to take all the chestnut ties he could cut; that Girard was the cause of his (witness) coming to Washington "to fill his contract, which he did not fill, and which I took"; that he knew Mr. Daniel M. Lee, a supplier of ties in Virginia, and had bought ties from him; that he was supposed to get all the balance of the 30,000 ties from Mr. Lee which Girard did not get; that he only got between 2,000 and 3,000 from Mr. Lee; that these were all that he had knowledge of Mr. Lee's shipping to him, and he supposed he got all; that he took the balance of the Lee ties which Girard did not take, and they were 2,000 or 3,000; that he was negotiating for these ties, and finally got them sometime in November; that he sold to the defendant company subsequent to November, 1903, 40,000 to 50,000 ties at 55 cents; that the market value of ties at that time and place was 55 cents, for that description of tie practically throughout all the summer months, and up to about March or April, 1907.

75 On cross-examination.

That he does not know that Girard had a contract with the B. & O. Railroad during the time of his contract with the defendant, but knows that he was shipping ties to the B. & O. Railroad practically all through the period that he was in business; that the B. & O. Railroad was purchasing the same class of ties Girard was shipping to the defendant, and other classes too; that the B. & O. Railroad was buying the same class of ties as specified in Girard's contract with the defendant; that he (witness) shipped to it at the same time; that it (the B. & O.) was buying these ties for the construction of its road; that it was buying them for the construction of its regular steam road.

Stipulations.

It was stipulated and agreed by and between counsel for the plaintiff and the defendant, that by an order passed by the Supreme Court of the District of Columbia, holding a Court in Bankruptcy, on the fifth day of November, A. D. 1906, in the matter of Henry N. Girard, bankrupt (No. 472), the said Henry N. Girard was adjudged a bankrupt; and that on the nineteenth day of November, A. D. 1906, at the first meeting of creditors in said bankruptcy proceedings, the plaintiff, E. Hilton Jackson, was duly appointed trustee of the estate of said bankrupt, and that he thereafter duly qualified as such trustee by giving the required bond.

It was also stipulated and agreed by and between counsel for the plaintiff and the defendant, as follows:

76 *Stipulation.*

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant in this action, as follows:

1. That the contract of June 16, 1906, mentioned in the declaration filed in this action, was duly executed by the said H. N. Girard

and the defendant, and that formal proof of its execution is hereby dispensed with.

2. That the letters and papers relating to the subject matter of this action, and signed by either John G. Masterton, Marbury and Gosnell, or C. F. Gladfelter, were signed by them, respectively, in their official capacities as the representatives of the defendant, and may, subject to any legal and proper exception by either side as to their admissibility, be introduced and used as evidence by either side at the trial of this action; *provided,* however, that no objection shall be made by either side to the introduction of any such letter or paper upon the ground that its author is present and able to testify in person. Formal proof of signatures waived.

3. That the letters and papers relating to the subject matter of this action, and signed by H. N. Girard, or Douglas and Douglas, as his counsel, and also the correspondence relating to the assignment by Girard to the National City Bank, of Washington, D. C., may, subject to any legal and proper exception by either side as to their admissibility, be introduced and used as evidence by either side at the trial of this action; *provided,* however, that no
77 objection shall be made by either side to the introduction of any such letter or paper upon the ground that its author is present and able to testify in person. Formal proof of signatures waived.

4. That, subject to any legal and proper exception by the plaintiff as to its admissibility in evidence, the defendant may show by a statement of its counsel that certain attachments were issued in the Superior Court of Baltimore City at the instance of said Girard's creditors, as follows:

August 1, 1906, by W. C. Bates Company for.....	$2,000.00
August 24, 1906, by Herbert Wingfield for.....	903.10
August 31, 1906, by John W. Masters for.....	1,329.00
Sept'r 10, 1906, by Sherwood Stonnell for.....	344.88
Aggregating.....	$4,676.98

that said attachments were duly laid in the hands of the defendant by service upon said Masterton; that the defendant filed a plea in each of said proceedings, a copy of the plea in said Bates' case being hereto attached, and like plea *mutatis mutandis* being filed in each of the other attachment cases, but that subsequently, upon the giving of a bond by said Girard, and upon his request, the defendant paid the above mentioned sums of money over to the National City Bank, of Washington, D. C.

5. That the defendant will produce at the trial a copy of John G. Masterton's letter of October 26th, 1906, to H. N. Girard, and the original letter of said Girard of November 2nd, 1906, in reply
78 thereto, for the use of the plaintiff in this action, subject to any legal and proper exception that may be interposed by the defendant as to their admissibility in evidence.

6. That the plaintiff and defendant will each produce in court at the trial of this action the entire correspondence in their possession,

and relating to the subject matter of said action, so far as said correspondence may be held to be pertinent to the issues involved therein.

E. BEVERLY SLATER,
Attorney for Plaintiff.
MARBURY & GOSNELL,
A. A. HOEHLING, JR.,
Attorneys for Defendant.

Dated this 9th day of March, 1909.

Copy of Plea in Bates' Case.

In the Superior Court of Baltimore City.

WILLIS C. BATES COMPANY, a Corporation,
vs.
HENRY N. GIRARD.

Washington, Baltimore and Annapolis Electric Railway Company, garnishee in the above-entitled case, by Marbury & Gosnell, its attorneys, says that it has in its hands the sum of forty-five hundred and fifty-two dollars and twenty-two cents ($4,552.22), being the purchase price for certain cross-ties and switch-ties sold and delivered by the defendant to the garnishee, and which sum of money is subject to the legal operation and effect, if any, of certain instruments of writing, of which the following are true copies:

79 Mr. J. G. Masterton, Treas. Washington, Baltimore & Annapolis Elec. Ry. Co., Baltimore, Md.

DEAR SIR: Please pay to the National City Bank of Washington, D. C., all moneys which may be due me at the present time for 9,663 ties shipped to date, and not settled for, and all moneys which shall become due hereafter on my contract with you, dated June 16th, 1906, for 75,000 ties, and 50 m ft. of switch lumber.

Yours, truly,
(Signed) H. N. GIRARD.

July 16th, 1906.

JULY 17TH, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We are in receipt of your communication dated July 16th, 1906, requesting us to pay to the National City Bank of Washington, all moneys now due and to become due in the future for ties and lumber agreed to be furnished this Company by you under contract dated June 16th, 1906. We are willing to make payments accordingly and have so advised the Bank. It must be understood, however, that the Bank is to act as your agent to sign for and on your behalf vouchers for such payments.

Kindly asknowledge receipt of this letter.

Yours very truly,

JOHN G. MASTERTON,
Secretary & Treasurer.

Accepted, July 17th, 1906.
H. N. GIRARD.

80

JULY 17TH, 1906.

Cashier National City Bank, Washington, D. C.

DEAR SIR: We are in receipt of an order by H. N. Girard, to pay you all moneys due on ties shipped to date, and also to pay whatever moneys may be due on ties and lumber shipped in the future on our contract with H. N. Girard, dated June 16th, 1906, and beg to advise that we are willing to make payments accordingly, it being understood that you are clothed with authority to sign vouchers for such payment on behalf of said H. N. Girard.

Kindly acknowledge receipt of this letter.

Yours very truly,

JOHN G. MASTERTON,
Secretary and Treasurer.

NATIONAL CITY BANK,
WASHINGTON, D. C., *July 24th,* 1906.

John G. Masterton, Esq., Secretary & Treasurer Washington, Baltimore and Annapolis Railroad Co., Maryland Building, Baltimore, Md.

DEAR SIR: Your favor of the 17th stating that you had received from Mr. H. N. Girard an order to pay you all money due on ties shipped to date and also to pay whatever money that may be due on ties and lumber shipped in the future (your letter and communication with Mr. H. N. Girard dated June 16th, 1906)

81 should be paid to the National City Bank, was duly received, and I trust you will pardon me for neglecting to acknowledge the same, but the letter got among some others from Mr. Girard and was filed before it was answered.

Mr. Girard has given us authority to sign vouchers for him.

Regretting the delay in acknowledging this, I am,

Very truly yours,

(Signed) A. G. CLAPHAM, *Cashier.*

MARBURY & GOSNELL,
Attorneys for Garnishee.

It was further stipulated and agreed that Frnak Gosnell, of counsel for defendant, who was present in court at the trial of the case, would, if sworn, testify that he had the conversation over the long distance telephone with Mr. Douglas as stated in the letters of Marbury and Gosnell to H. N. Girard, dated November 5, 1906, and to Douglas and Douglas, dated November 7, 1906; and that the statements in said letters may be considered in evidence and have the same legal effect as if the same had been testified to by him as a witness on the stand.

NOTE.—The letters offered in evidence at the trial, chronologically arranged, and the petition in bankruptcy and its accompanying schedules are, as follows:

82 WASHINGTON, D. C., *June* 16, 1906.

Washington, Baltimore and Annapolis Electric Railway Co., J. G. Masterson, Sec't'y & Treasurer, Baltimore, Md.

DEAR SIR: I hereby authorize you to pay to Willis C. Bates Co. of Boston, Mass. all moneys due for ties and lumber shipped by me to you on the contract between us dated June 16, 1906, as I have assigned all my rights, etc. to the Willis C. Bates Co.

Yours truly, H. N. GIRARD.

BALTIMORE, MD., *June* 20, 1906.

Mr. H. N. Girard, Columbian Building, Fifth Street N. W., Washington, D. C.

DEAR SIR: Your favor of June 18th has been received. We are indeed very much pleased at the activity which you are showing in forwarding ties to us. We will look out for these shipments and take care of them upon their arrival at destination.

Yours very truly,

C. F. GLADFELTER.

C. F. G.

83 (Copy.)

JULY 13, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have received within the last few days bills for several cars of crossties which have not been inspected by our Mr. Howard. Apparently some of your shippers are forwarding ties without our inspector passing on them, presumably contrary to your instructions. We give you statement of cars unloaded since 11th inst. that are not turning out very well:

C. R. I. & P.,	#57914,	contained 279 instead of 299 ties, 10 of which are culls.
P. R. R.,	#72132,	contained 15 culls.
P. R. R.,	#75740,	" 31 culls.
S. & W.,	#1760,	contents of which were transferred from P. Co. #18558, contained 40 seconds and 8 culls.
P. F. W. & C.,	#515212,	35 seconds and 10 culls.
B. & O.,	#88978,	59 seconds and 35 culls.
"	#79993,	13 seconds and 2 culls.
Southern Ry.,	#25144,	contained only 330 instead of 350 ties.

Our Engineers report that quite a lot of the ties are showing up very poor, some being cut from dead timber, others worm eaten and rotten; also some few cut from burnt timber. Wish you would please investigate the matter, as apparently your inspectors are not watching shipments very close, and would be very glad to have you come to Odenton again and look over these ties if you feel there is any question about our statement. Am sure since your last visit

they have not been as rigid on the inspection, but simply fol-
84 lowing specifications as outlined in contract. Kindly in-
struct your people not to ship any ties until passed upon by our inspector.

Yours very truly, JNO. G. MASTERTON,
Sec. & Treas.

BALTIMORE, MD., *July* 13, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We seem to be accumulating quite a stock of ties and would suggest that you suspend shipments for awhile until the contractors get ahead with track laying.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

JULY 14, '06.

Washington, Baltimore & Annapolis Elec. Ry. Co., Baltimore, Md.

GENTLEMEN: I beg to acknowledge receipt of yours of the 13th, and replying would say, that I will defer shipments of ties, so as to give you people chance to use the ties you have before I ship any
more, however I will have to keep shipments coming along
85 at the rate of one car per day, which I trust will be satisfactory, and you will be able to use them at this rate.

With further reference to yours of the 13th, would say, I have no notice of cars #81603 & #88392 being consigned to you at Odenton, and I am afraid those ties have been shipped in by one of my customers, that being the case, please have them unloaded and let me have the report as soon as possible, so I may have inspection, to settle with party who shipped them in, as I have no doubt whatever that they are ties shipped for me.

Thanking you for past favors, I beg to remain,

Yours truly, H. N. GIRARD.

Dict. M. W.

Mr. J. G. Masterton, Treas. Washington, Baltimore & Annapolis Elec. Ry. Co., Baltimore, Md.

DEAR SIR: Please pay to the National City Bank of Washington, D. C., all moneys which may be due me at the present time for 9,663 ties shipped to date, and not settled for, and all moneys which shall become due hereafter on my contract with you dated June 16, 1906, for 75,000 ties, and 50 M ft. of switch lumber.

Yours truly, H. N. GIRARD.

July 16, 1906.

86 BALTIMORE, MD., *July 17th,* 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We are in receipt of your communication dated July 16th, 1906, requesting us to pay to the National City Bank of

Washington all moneys now due and to become due in the future for ties and lumber agreed to be furnished this Company by you under contract dated June 16, 1906. We are willing to make payments accordingly and have so advised the Bank. It must be understood, however, that the Bank is to act as your agent to sign for and on your behalf vouchers for such payments.

Kindly acknowledge receipt of this letter.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

Cashier National City Bank, Washington, D. C.

DEAR SIR: I hereby give you authority to sign vouchers received in payment for my account from the Washington, Baltimore and Annapolis Electric Ry. Co. This in accordance with their letter to you dated July 17, 1906.

Yours truly, H. N. GIRARD.

87 JULY 17, 1906.

Cashier National City Bank, Washington, D. C.

DEAR SIR: We are in receipt of an order signed by H. N. Girard to pay you all moneys due on ties shipped to date, and also to pay whatever moneys may be due on ties and lumber shipped in the future on our contract with H. N. Girard, dated June 16, 1906 and beg to advise that we are willing to make payments accordingly, it being understood that you are clothed with authority to sign vouchers for such payments on behalf of said H. N. Girard.

Kindly acknowledge receipt of this letter.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

BALTIMORE, MD., *July* 23, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have not yet received any reply from National City Bank, Washington, D. C., to our letter 17th inst. which was handed to you for delivery in person. Did they object to answering same?

Wish you would kindly ease up much as possible on ship-
88 ment of ties for a week or so until our track layers get a little ahead. According to advices, shipments have been coming forward during the past week on an average of two cars a day.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

BALTIMORE, MD., *July* 23, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have received the following cars containing chestnut ties, for which we have not yet any invoice or bill of lading: A. C. L. #26588 and B. & O. #88392.

Please let us have bills for these, and oblige

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

BALTIMORE, MD., *July* 23, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: Have you obtained any trace of car Southern
89 #25980, containing crossties, supposed to have been shipped us on June 15th? Same has not been received. Bill of lading would indicate that it was originally consigned to W. H. Staub, Baltimore, Md., and re-consigned en route to us at Odenton. Is it possible that railroad billing was never changed and it was delivered as originally consigned? We have also not yet received car C. & O. #3705, containing 255 ties, billed us 3rd inst., bill of lading dated June 28th. Please investigate and advise.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

JULY 24TH, '06.

Mr. J. G. Masterton, Sec'y & Treas. W. B. & A. E. Co., Baltimore, Md.

DEAR SIR: I have your favors of the 23rd, and would say I have written the National City Bank of this city to acknowledge receipt of your letter of the 17th, which was handed to me for delivery in person. They stated that everything was satisfactory, and I guess Mr. Clapham did not think it was necessary to acknowledge the same, but I trust you will hear from him without further delay. Beg to say that I mailed you bill of lading yesterday for car #88392 B. & O., and beg to enclose you duplicate bill for A. C. L. #26588 containing 277 ties, which car was shipped July 6th, and our
90 records show that bill was mailed on that date. I hope this will straighten matter in regard to Sou. #25980 supposed to be shipped you on June 15th. I am advised by Mr. W. H. Staub, Pur. Ag't of the United Railway & Electric Co., of Baltimore, that this car has been received and unloaded by them, and your supposition was correct, that the billing was never changed by the railroad Company, but they promised to do this, hence I changed shipping directions. I have taken the matter up with the shipper of C. & O. #3705 which was shipped on the 28th June, from Ivy, Va. containing 255 chestnut ties, and as soon as I hear from him I will advise you.

Yours, H. N. GIRARD.

NATIONAL CITY BANK,
WASHINGTON, D. C., *July* 24, 1906.

John G. Masterton, Esq., Secretary & Treasurer Washington, Baltimore & Annapolis Railroad Co., Maryland Trust Building, Baltimore, Md.

DEAR SIR: Your favor of the 17th stating that you have received from Mr. H. N. Girard an order to pay you all moneys due on ties, shipped to date and also to pay whatever money that may be due on ties and lumber shipped in the future (your letter and communication with Mr. H. N. Girard dated June 16th, 1906) should be

paid to the National City Bank, was duly received, and I trust
91 you will pardon me for neglecting to acknowledge the same, but the letter got among some others from Mr. Girard and was filed before it was answered. Mr. Girard has given us authority to sign vouchers for him.

Regretting the delay in acknowledging this, I am,

Very truly yours,

(Signed) A. G. CLAPHAM, *Cashier.*

BALTIMORE, MD., *July* 24, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: Referring to your bill 23rd inst. for car Southern #36592: Our inspector, Mr. Howard, reports 400 ties loaded in this car and your invoice calls for 420. Have you not made an error in billing the latter number?

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

JULY 25TH, '06.

Mr. J. G. Masterton, Sec'y & Treasurer W., B. & A. E. Co., Baltimore, Md.

DEAR SIR: In answer to your favor of the 24th, in regard
92 to Sou. #36592 would say, that these ties were inspected on the ground by Mr. Howard, who inspected just 406. My inspector went down there to see the ties when they were loaded, and no bad ones were put in, as they were inspected by Mr. Howard, when they were taken up in piles, also to verify the count, and my inspector found six ties that Mr. Howard had inspected and accepted that were bad, and the party who furnished these ties, while he was loading the car, brought in a load of 20 ties, that were all good ties, and as that was all he was going to have at that station for the next three months, and asked the inspector if we could not put them in, which we did, thus the difference in the count of this car. I am sure you will find 420 ties in the car, first class ties, as I told my man to be careful to load *not* ties but what were all O. K. even if they had been inspected by Mr. Howard. Shipments will be coming forward a little slower now, as I have made arrangements with another road to take a few thousand ties from me, but I will keep them going along at the rate of about one car load a day, as I have Mr. Howard here now and he is getting acquainted with the territory, I would like very much to keep him, even if we do not rush the ties, as we have a good start. I feel easier than when I took the contract. Could you not make arrangements to settle for the last month's ties about the first of August, as I am contemplating taking a trip for ten days or so, and would like to get the matter straightened out before I left, if possible.

Trusting the explanation in regard to the car #36592 is satisfactory, I beg to remain,

Yours truly, H. N. GIRARD.

Dict. M. W.

93 BALTIMORE, MD., *July* 26, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: Your letter 25th inst. received and note what you say regarding the number of ties loaded in car Southern #36592, and have no doubt it will check out all right.

Will have your bills checked up for ties shipped this month and endeavor to arrange for settlement about August 5th, as desired. Please ease up on shipments much as possible for awhile until our contractors get ahead with tracklaying.

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

BALTIMORE, MD., *August* 1, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have been served with an attachment by the Willis C. Bates Company for $2,000.00 with interest from July 1st, 1906, covering money due you for ties delivered, account of your contract. This will tie up payments until the attachment is dissolved.

94 Awaiting your advices in the matter,

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

(Copy.)

AUGUST 6, 1906.

Mr. A. G. Clapham, Cashier National City Bank, Washington, D. C.

DEAR SIR: Herewith cheque amounting to $3762.99, in payment for 28 cars crossties received from Mr. N. H. Girard up to and including July 31st, 1906. Please receipt and return accompanying voucher in duplicate, signed H. N. Girard per National City Bank, and oblige

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

WASHINGTON, D. C., *August* 13, 1906.

Messrs. Marbury & Goxnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: We enclose you herewith copy of a letter which we have just written to the Washington, Baltimore & Annapolis Electric Railroad Company, which will explain itself. We will ap-
95 preciate it if you will advise us as to the present status of this suit and give us all the information in the premises.

Trusting that you will give this matter your prompt attention and appreciating any courtesy you can show us, we are

Yours very truly,

DOUGLAS & DOUGLAS

ESD/J.

7—2082A

AUGUST 13, 1906.

Washington, Baltimore & Annapolis Electric Railroad Company, Baltimore, Md.

GENTLEMEN: We are advised that some proceeding has been commenced against Mr. H. M. Girard by the W. C. Bates Company of Boston, and that certain credits in your hands to the amount of $2,000, belonging to Mr. Girard, have been attached by the Bates Company. We are the attorneys for Mr. Girard and are now trying to ascertain what the status of this suit is. He advises us that no papers whatsoever have been served upon him. The Bates Company filed a similar suit in the State of Virginia, and this latter suit has been settled. Will you kindly advise us what this situation is. If you can refer us to your attorneys in the matter we will be very glad to take it up with them as we claim that under the circumstances
are client is entitled to have these proceedings dismissed.
96 Please let us hear from you.

Yours very truly, DOUGLAS & DOUGLAS.

ESD/J.

BALTIMORE, MD., *August* 16, 1906.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: Replying to your letter 13th inst. relative to proceedings commenced against Mr. H. N. Girard by the Willis C. Bates Company of Boston, attaching $2000.00 due Mr. Girard for crossties furnished us. We have referred your letter to our attorneys, Messrs. Marbury and Gosnell, who are writing you today regarding the matter. Up to the present time these proceedings have not been dismissed.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

97 Subject: Bates Co. vs. Girard—Attachment.

AUGUST 16, 1906.

Messrs. Douglas & Douglas, Attorneys at Law, Colorado Bldg., Washington, D. C.

GENTLEMEN: We beg to acknowledge receipt of your favor of the 13th instant. Upon an examination we find that this suit was instituted to our August Rule Day (Second Monday), and that the claim is for "Cash advanced on Washington, Baltimore & Annapolis Electric Railway Company account." As the Washington, Baltimore & Annapolis Electric Railway Company has in its hands more funds than sufficient to meet the claim of the plaintiff, we shall be obliged, for our own protection, to file a confession of assets. This case will not be reached for trial in regular course until sometime during the term which commences on the second Monday of September, and it may be that it will not be reached until the January Term.

We do not know what the plaintiff means in the statement of claim "To cash advanced on Washington, Baltimore & Annapolis

Electric Railway Company account," as our client had no knowledge of and nothing to do with the dealings between the parties.

We note in your letter of the same date to the Washington, Baltimore & Annapolis Electric Railway Company that the Bates Company filed a similar suit against Girard in the State of Virginia, which has been settled, and that a like disposition will prob-
98 ably be made of this suit.

Very truly, MARBURY & GOSNELL.

(Dictated F. G.—P.)

BALTIMORE, MD., *August* 23, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have been served with another attachment by Leslie M. Spinney, agent for Herbert Wingfield, for $903.10, covering any funds due you in our possession for crossties delivered account your contract. This makes the second one served on us. Please advise what action will be taken to dismiss same.

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

H. N. Girard.

WASHINGTON, D. C., *August* 24, 1906.

W., B. & A. El. Ry. Co., Baltimore, Md.—Mr. J. G. Masterton.

DEAR SIR: I have yours of even date and will say that I
99 have taken steps to have both attachments dismissed at once, as both attachments were false and bogus, and, another thing, you don't owe me anything for ties and lumber, as I have been paid by the National City Bank and they are the ones you owe.

Yours truly,

H. N. GIRARD.

P. S.—When you are ready for more ties, etc., advise me and I will arrange to ship them in as you need them.

H. N. G.

AUGUST 24, 1906.

Messrs. Marbury & Goxnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: The bearer of this letter, Mr. William B. Matthews, Jr., is authorized by us to investigate the status of the case of the W. C. Bates Company against the Washington, Baltimore & Annapolis Railroad Company, upon which an attachment has been levied. We will appreciate it if you will give him all of the information which you can furnish as to the amount of credits in the hands of the Railroad Company for Mr. Girard. We would like also to know when the answer in this matter is due. Any courtesy you can show him in the matter will be very much appreciated, and we

trust that *that* we will be able at sometime in the future to
100 return the same.

Yours very truly, DOUGLASS & DOUGLASS.

ESD/J.

Subject: Girard Attachments. 3929.

AUGUST 27, 1906.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: We regret that we will not be able to give you today the information promised Mr. Matthews when here Saturday. Mr. Masterton, of the Railroad Company, has not been able to complete his fitures up to this hour, but we shall certainly be in a position to write you fully to-morrow.

Very truly, MARBURY & GOSNELL.

(W. W. P.)

Subject: Girard Attachments. 3929.

101 BALTIMORE, *August* 28, 1906.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: Mr. Masterton informs us this morning that it is impossible to arrive at exact figures in the matter of Girard's account with them, but, according to information at hand now, it looks as if the Railroad Company owes him nearly $3,000, or just about enough to cover both attachment cases.

Please let us know if these attachment cases are to be dismissed.

Very truly,

MARBURY & GOSNELL.

(W. W. P.)

SEPTEMBER 1ST, 1906.

Mr. A. G. Clapham, C'h'r National City Bank, Washington, D. C.

DEAR SIR: We have been served with another attachment by Jno. William Masters for $1329.00—or any funds we may have in our possession due Mr. H. N. Girard for cross-ties delivered ac-
102 count his contract.

This for your information.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

BALTIMORE, MD., *September 1st,* 1906.

Mr. H. N. Girard, 313 Columbian Bldg., Washington, D. C.

DEAR SIR: We have been served with another attachment by Jno. William Masters for $1329.00—or any funds we may have in our possession due on account your contract for cross ties.

This for your information.

Yours very truly, JNO. G. MASTERTON,
Sec'y & Treas'r.

103 BALTIMORE, MD., *September* 11, 1906.

Mr. H. N. Girard, 313 Columbian Building, Washington, D. C.

DEAR SIR: We have been served with another attachment by Sherwood B. Stonnell for $344.80 and costs on any funds we may have in our possession due on account of crossties delivered on your contract. This for your information.

Yours very truly,

JNO. G. MASTERSON,
Secretary & Treasurer.

P. S.—Some time ago we wrote you regarding non-arrival of car C. & O. 3705. It has developed that contents were transferred into C. & O. 2416 and latter car only recently received. If you will kindly sent us two of your blank bill heads we will make up invoice for same.

J. G. M.

SEPTEMBER 12, 1906.

Washington, Balto., & Annapolis Rwy. Co., Baltimore, Md.

GENTLEMEN: Yours of the 11th inst to Mr. Henry N. Girard has been referred to us for attention. We enclose you herewith two of
his blank bill heads as requested. We would appreciate it if
104 you would give this matter your prompt attention and send
us full statement, showing the net balance to his credit to date. Kindly give this matter your prompt attention.

Yours very truly,

DOUGLASS & DOUGLASS.

ESD/J

SEPTEMBER 14, 1906.

Washington, Baltimore & Annapolis Elec. Ry. Co., Maryland Trust Building, Baltimore, Md.

GENTLEMEN: We have mailed you, under separate cover, order signed by the Cashier of the National City Bank and by Mr. Girard, authorizing you to turn over to us and to the Title Guaranty & Surety Company the amount now standing to the credit of Mr. Girard. We beg to request that you send us check fo*t* this amount. We also desire to call your attention to the fact that Mr. Girard has today filed a bond with sureties approved by the Clerk of the Court for all outstanding attachments or liens against this fund. Kindly let us hear from you.

Yours very truly,

DOUGLASS & DOUGLASS.

ESD/J

105 (3901) BALTIMORE, *September* 15, 1906.

Messrs. Douglas & Douglas, Attorneys at Law, Colorado Bldg., Washington, D. C.

GENTLEMEN: Your letter of the 14th instant to Washington, Baltimore and Annapolis Electric Railway Company, and also order on

the Company signed by the Cashier of the National City Bank and Mr. Girard to pay over to you and to the Title Guaranty & Surety Company whatever money or moneys that may be in the hands of the Company belonging, owing or due to Girard, are now before us. The amount in the hands of the W., B. & A., as shown by the confession of assets filed in the case of Willis C. Bates Company, a corporation, vs. Girard, in the Superior Court of Baltimore City, is $4,552.22. Deducting from that amount the claim of W. U. Thompson, amounting to $682.45, there is a balance left of $3869.77, for which we enclose you a check of the Washington, Baltimore and Annapolis Electric Railway Company payable to the order of C. F. Gladfelter and endorsed to you and the Title Guaranty & Surety Company, of which kindly acknowledge receipt.

The amount reserved to meet the claim of Thompson is in accordance with an arrangement between your correspondent here, Mr. Vernon Cook, and ourselves had this morning. We have no doubt that we can agree to a plan whereby this $682.45 can also be paid over to you upon the National City Bank indemnifying the Company
106 against any claim of Thompson in form satisfactory to us.

There is also an item of costs in the attachment cases, which, according to the views of Mr. Cook and ourselves, should be deducted from the amount due to Girard. This item can be taken care of, however, in the final adjustment of the accounts.

Very truly yours,

MARBURY & GOSNELL.

(Dictated F. G.—P.)

P. S.—Please sign the enclosed vouchers yourself and also have them signed by the Title Guaranty & Surety Company, and return to us.

M. & G.

SEPTEMBER 17, 1906.

Washington, Baltimore & Annapolis Electric Ry. Co., Maryland Trust Building, Baltimore, Md.

GENTLEMEN: As attorneys for Henry N. Girard, we are about to enter into an arrangement with the Willis C. Bates Company of Boston, whereby Mr. Girard is to assign to the Bates Company all unfilled orders now outstanding in his name. Kindly advise us, by first mail, if you will accept such an assignment of said orders.

Trusting that you will give this matter your very prompt
107 attention, we are,

Yours very truly,

DOUGLASS & DOUGLASS.

ESD/J

(3901) BALTIMORE, *September* 19th, 1906.

Messrs. Douglas & Dougles, W. B. Mathews, Esq., Attorney at Law, Washington, D. C.

DEAR SIR: I am writing to say that I have received the bond to the Washington, Baltimore and Annapolis Electric Railway Com-

pany duly executed by Henry N. Girard and the Title Guaranty and Surety Company of Scranton, Pennsylvania, surety. You are accordingly authorized to use the check of the Company endorsed to the order of Douglas & Douglas, Attorneys for the National City Bank, for $700, which was handed to you yesterday, but not to be used until the delivery of the above bond to me.

The Company has not as yet received the vouchers for the check of the Company handed to you on the 15th instant for $3869.77.

Kindly forward same upon receipt of this.

Yours very truly, FRANK GOSNELL.

(Dictated F. G.—P.)

108 SEPTEMBER 19, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: Our Mr. Matthews, who had a talk with you on yesterday, advises us that there may be some question as to whether or not Mr. Girard was acting as your agent in the furnishing of cross ties to you under the contract given by your company to him. This is the first time that we have had any intimation that there was any question as to the matter of agency. It is our judgment that there can be no doubt that Mr. Girard was purchasing these ties upon his own responsibility and was filling the order with you. We would appreciate it if you would give us any information you have upon this subject. This question, of course, might affect the question of the validity of the assignment made by Mr. Girard to the National City Bank of this city. It is our endeavor to have these matters straightened out and avoid as far as possible any controversy between your company as well as all of the creditors of Mr. Girard who have any claim against this fund. Any information you can give us in the premises will, of course be received in confidence and will be very much appreciated.

Thanking you for the courtesy you have sh*wo*n to our Mr. Matthews, and appreciating any further courtesy you can show us in the premises, we are,

Yours very truly, DOUGLASS & DOUGLASS.

ESD/J

109 SEPTEMBER 19, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: Since talking to you over the telephone, I have had a talk with Mr. Parker with reference to the bond in the matter of the claim of Thompson against Girard. Mr. Parker, the local agent of the Surety Company, assures me that he has mailed a copy of the bond to Mr. Harley, with the request that he sign and forward it to you at once. We have placed your check in bank upon the assurance from Mr. Parker that there would be no hitch in having the bond approved upon the part of Mr. Harley. Should Mr. Harley not send you the bond approved in accordance with our agreement, kindly advise us at our expense over the telephone tomorrow morning, and we will have the check recalled. We, of course appreciate the fact

this check should not be cashed until you are in actual possession of the bond.

Yours very truly, DOUGLASS & DOUGLASS.

ESD/J

(3901) BALTIMORE, *September* 20, 1906.

Messrs. Douglas & Douglas, Attorneys at Law, Colorado Bldg., Washington, D. C.

GENTLEMEN: Replying to your two favors of the 19th inst.
110 We wrote you yesterday that we had received from Mr. Harley the bond given to the Washington, Baltimore and Annapolis Electric Railway Company, by Girard.

With reference to the claim made by Thompson, that Girard was the agent of the Company in purchasing certain ties from him, we beg leave to say that this position of Thompson is absolutely untenable, as Girard was never at any time our agent, but was purchasing ties on his own responsibility and delivering them to us in compliance with his contract with the Company. The position of the Company is clearly set forth in our letter of the 5th of September to Moore & Keith, Attorneys for Thompson, a copy of which we enclose you. We are also enclosing you a copy of the letter to which the above mentioned letter is a reply.

Very truly yours, MARBURY & GOSNELL.

(Dictated F. G.—P.)

Law Office Of
Moore & Keith,

FAIRFAX, VA., *Sept.* 4, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: We have your letter of the 1st inst. relative to the claim of W. U. Thompson against the Washington, Baltimore and Annapolis Elec. Railway, and note that you will investigate the facts and write us fully next week.

111 The principal fact, so far as your Company is concerned, upon which our client relies, is this: He can establish by several witnesses that he gave positive orders to the party who was inspecting ties for your Company that the ties should not leave Vienna, the place of shipment, until the amount due for the ties was paid him. He gave this direction because he heard rumors that Girard's affairs were getting in bad shape. But nothwithstanding Thompson's instructions the tie inspector for the W. B. & A. E. Ry. went to the agent of the Southern Railway Company at Vienna got bills of lading for the cars and then demanded that the cars be moved at once, which was done, without Thompson's knowledge or consent.

Very truly yours, MOORE & KEITH.

SEPTEMBER 5, 1906.

Messrs. Moore & Keith, Fairfax, Virginia.

GENTLEMEN: We have found upon examination that H. N. Girard, by written contract, agreed to sell and deliver to the Washington, Baltimore and Annapolis Electric Railway Company a certain number of crossties and switch ties at certain prices, the ties to pass the inspection of the Engineer of the Company; that in no sense was Girard the agent of the Company, nor authorized to bind it in any manner whatsoever, and that the duty of the inspector was simply to inspect, and that he had no authority to act for the Com-
112 pany, except to make the inspection.

We must, therefore, on behalf of the Company, deny that Girard in any of his dealings with Thompson was acting for the Company as its agent, or otherwise, and also deny that the inspector had any authority to bind the Company apart from the act of inspection.

In view of the foregoing, we must, on behalf of the Company, specifically deny that any ties were shipped by Mr. W. U. Thompson to the Company; that the ties in question were purchased from Thompson by Girard as agent of the Company; that the agent of the Company ordered their shipment, and that so far as the Company is concerned, there was any agreement that the ties were to be paid for prior to shipment.

It seems to us rather inconsistent with the present attitude of Thompson that he should have taken the personal check of Girard in payment of the ties in question.

Very truly yours, MARBURY & GOSNELL.

(Dictated F. G.—P.)

113 SEPTEMBER 20, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: We received yours of the 15th instant, enclosing check for $700 in the Girard matter. We are also in receipt of yours of the 19th instant, advising us that you have received the bond indemnifying the Washington, Baltimore & Annapolis Electric Railway Company against any liability which might be established against the Railway Company growing out of the Thompson claim. It was our understanding that as soon as the bond was approved by our local agent of the Surety Company that the check could be used, and we consequently placed it in bank on yesterday. As soon as Mr. Parker, the local agent of the Surety Company approved the bond. Since the bond is now in your hands however, we assume there will be no difficulty about the check be cashed at your end of the line.

We return you herewith the vouchers for the $3,869.77 received by us in your letter of the 15th. We trust that this phase of the matter is now satisfactory to you. We would appreciate it if you would have the Railway Company cast the account between the

Company and Mr. Girard as early as possible, so as to have the matter settled and disposed of at earliest possible date.

Yours very truly,

DOUGLASS & DOUGLASS.

ESD/J

114 BALTIMORE, *September* 21, 1906.

(3901)

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

DEAR SIRS: We have your favor of the 20th instant, enclosing vouchers for the $3,869.77 forwarded to you in our letter of the 15th instant.

We will have the accounts made out between Washington, Baltimore and Annapolis Electric Railway Company and Girard in the next day or so, and forward the same to you.

Very truly yours,

MARBURY & GOSNELL.

(Dictated F. G. - P.)

BALTIMORE, MD., *September* 22, 1906.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: Replying to your letter 17th inst., beg to advise we will not accept any assignment of contract for crossties with Mr. H. N. Girard to the Willis C. Bates Company of Boston.

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

115 WASHINGTON, D. C., *October* 4, 1906.

Washington, Baltimore & Annapolis Ele. Ry. Co., Maryland Trust Building, Baltimore, Md.

GENTLEMEN: I beg to call your attention *my* my contract with you for the shipment of about 50,000 ties, which contract has not as yet been filled. I beg also to call your attention to certain correspondence between us in which you request that the shipment, in accordance with the contract between your company and me, be held up to suit your convenience. Your attention is also directed to the fact that I am ready to fulfill the terms of my contract, and in view of the fact that you have made the request that these shipments be delayed for your own convenience, I now request that you advise me as to when you wish the balance of this contract carried out; also to know the number of ties which you wish shipped from time to time. I beg further to advise you that since this contract has not been filled, owing to the fact that you were not able to accept the ties in accordance with the terms of the contract, that you will give me full information in the premises; otherwise I will hold you for all damages growing out of the breach of the same. Kindly let me hear from you by return mail. Please address your reply

to me in care of Douglas & Douglas, Colorado Building, Washington, D. C.

Yours very truly,

H. N. GIRARD.

116 OCTOBER 4, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: Referring to the contract between H. N. Girard and the Washington, Baltimore & Annapolis Electric Railway Company, we beg to say that our Mr. Matthews, together with Mr. Girard, went over to Baltimore today to see Mr. Masterton. They were advised by him that they would not deal with any one except Mr. Girard direct. In view of the courtesies that you have heretofore shown us in this matter, we think it proper to advise you as to the situation as we are at present advised. Mr. Girard has a contract with the Railwas Company in which there is involved about 50,000 ties which have not as yet been delivered. We enclose you herewith copy of a letter which we have dictated and had him to sign addressed to the Railway Company, which will explain itself. We feel it our duty to advise you of this situation, and we feel assured that you will join us in having the matter adjusted upon a fair and proper basis. The correspondence in our hands will show that the shipment of these ties has been held up at the request of the Railway Company. If under the circumstances you will take this matter up and advise us accordingly, we will very much appreciate it.

Yours very truly,

DOUGLASS & DOUGLASS.

ESD/J

117 BALTIMORE, *October* 6, 1906.

(3985)

Messrs. Douglas & Douglas, Attorneys at Law, Colorado Bldg., Washington, D. C.

GENTLEMEN: We are in receipt of your favo*t* of the 4th instant, enclosing copy of letter signed by H. N. Girard and addressed by him to the Washington, Baltimore and Annapolis Electric Railway Company, both relating to a contract heretofore entered into between those parties for the delivery of certain ties, etc. Mr. Gosnell, who has this matter in charge, has been engaged in the trial of a case since last Monday that will not be concluded until sometime next week, and as soon thereafter as practicable he will make a full investigation of the facts and communicate with you further upon the subject.

Very truly yours,

MARBURY & GOSNELL.

(Dictated F. G.—P.)

BALTIMORE, *October* 8, 1906.

Subject: H. N. Girard—3901.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: We have paid costs in the following attach-
118 ment cases (other than the short note cases), where the Washington, Baltimore and Annapolis Electric Railway Company was garnishee, namely:—Stonwell, $12.15; Wingfield, $17.75; Masters, $17.75. The costs in the Bates case were paid, we presume, by the plaintiff. All these attachments were dissolved on the 14th of September, 1906. The balance due for crossties and switchties purchased from Girard to date amounts to $95.92, and we are sending you herewith check of the Company to the order of C. F. Gladfelter, and by him endorsed to you as attorneys for the National City Bank, with the request that you sign the vouchers in duplicate thereto attached and return to us.

Very truly yours,

MARBU*F*Y & GOSNELL.

(Dictated F. G.—P.)

WASHINGTON, D. C., *October* 16, 1906.

John G. Masterton, Esq., c/o Wash., Balto. & Anna. Elec. R'w'y Co., Maryland Trust Building, Baltimore, Md.

DEAR SIR: I have received your statement and freight bills as *as* per your letter of the 13th inst. and note that the total credits amount to $4,713.34 according to your own statement. Douglas & Douglas, my attorneys, have thus far received the following amounts: One
check for $3,869.77, another for $700 and another for about
119 $90, the sum total of these checks being $4,659.77, which deducted from $4,713.34 would still leave a credit in your hands due me of $53.57, for which you will please send check to me, or explain this difference in your account. Kindly let me hear from you immediately.

Yours very truly,

H. N. GIRARD.

E.

BALTIMORE, MD., *October* 18, 1906.

Mr. H. N. Girard, 431 Sixth Street N. W., Washington, D. C.

DEAR SIR: Replying to your letter 16th inst., we give you as follows, statement of disbursements of total credit, $4713.34:

Douglas & Douglas, cheque	$3869.77
Douglas & Douglas, cheque	700.00
Douglas & Douglas, cheque	95.92
Court costs in 3 of the 4 attachments which were laid in the hands of this Company at the suit of your creditors	47.65
	$4713.34

Mr. Douglas, your attorney, promised our counsel, Mr. Gosnell, Tuesday last, to return voucher covering last remittance of $95.92. Will you kindly have this mailed immediately, and oblige

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

120 WASHINGTON, D. C., *Oct.* 19*th,* 1906.

Mr. J. G. Masterson, Sec. and Treasurer, Baltimore, Md.

DEAR SIR: Referring to your favor of the 18th will say that I have today requested My Attern-y, Mr. Douglas to send your voucher back to you at once covering the last remittence, hoping that this is satisfactory and that you will get it at once beg to remain,

Yours very truly,

H. N. GIRARD.

BALTIMORE, MD., *October* 26, 1906.

Mr. H. N. Girard, 431 Sixth Street N. W., Washington, D. C.

DEAR SIR: Referring to our conversation Saturday last, 20th inst., with reference to further shipment of crossties: We have heard nothing from you regarding the matter up to the present time. It is important that there be no further delay, as we must have 15,000 ties immediately. Please advise if you are ready for inspector, as shipments must now be pushed forward.

Yours very truly,

JNO. G. MASTERTON,
Secretary & Treasurer.

121 WASHINGTON, D. C., *October* 27*th,* 1906.

Mr. John G. Masterson, Sec't'y and Treasurer, Baltimore, Md.

DEAR SIR: In reply to yours of the 26th beg to say that I have had four cars order-d in for three days at Barboursville Va. and up to date they have not been placed I have order-d in cars at two dif-erent places and am ready to load soon as they are placed, and will notify you to send inspector at once soon as the cars are placed whitch I expect will be in the next day or so, I will use ev-ry effort possiable to get the 15000 ties shipped soon as possiable; we have had a great deal of rain of lately and the roads are in bad shape for hauling but as we are now having good weather hope to be able to rush them in fast. Hoping this will be satisfactory to you and that the cars will — placed soon beg to remain.

Yours very truly,

H. N. GIRARD.

NOV. 2D, 1906.

Mr. J. G. Masterson, Sec't'y & Treasurer, W., B. & A. El. Ry. Co., Baltimore, Md.

DEAR SIR: It was with much surprise I got your message over the Phone yesterday that you would not send your inspector to

take up the ties for me that I had ready to ship you on our contract, owing to the fact that you had heard that I was
122 about to be put into Bankruptsy or some thing like that, as I told you over the Phone when we were talking that after I rec'd your letter of the 27th to commence shipping ties at once I made all arrangements to do so and got cars ready and ev-rything and when I told you to send inspector I was very much surprised, as I say. I have always lived up to my contract with you and would like you to let me know when I can start shipping, the balance due on Contract, and Oblige,

Yours very truly,

H. N. GIRARD.

BALTIMORE, *November 5th*, 1906.

Mr. H. N. Girard, 431 Sixth St. N. W., Washington, D. C.

DEAR SIR: Your letter of the 2d instant to Mr. Masterton, Secretary and Treasurer of the Washington, Baltimore & Annapolis Electric Railway Company, has been handed to us for reply.

Since the letter of October 26th of Mr. Masterton to you, namely, on the 30th of October, Mr. Gosnell had a conversation over the long distance telephone with Mr. Douglas, your counsel, he having called Mr. Gosnell up for the purpose of notifying him that he was about to file proceedings in bankruptcy in your behalf, and in the course of that conversation made a proposition that the con-
123 tract that was entered into between you and the Company should be cancelled, and after your bankruptcy proceedings, the matter should be taken up with you and a new contract made for the delivery of the balance of the ties. Of course, Mr. Gosnell promptly replied that we would not be a party to any such arrangement as that suggested by Mr. Douglas, whereupon Mr. Douglas said he would schedule this contract, or whatever rights you had under it, as one of your assets, to which Mr. Gosnell replied, he had nothing whatever to do with what your schedule contained.

Mr. Masterton's letter of October 26th to you and his subsequent interview with you over the 'phone were prior to any knowledge that any of us had of your contemplated proceedings in bankruptcy, and the conversation with Mr. Douglas, above detailed, necessarily terminated any negotiations between you and the Company for the undelivered ties; and as we have not been advised that those bankruptcy proceedings were not commenced on October 30th, as we were advised they would be commenced, we must still decline to take any steps looking to the delivery of any more ties by you.

Yours very truly,

MARBURY & GOSNELL.

F. G./S.

124 NOVEMBER 6, 1906.

Messrs. Marbury & Gosnell, Maryland Trust Building, Baltimore, Md.

GENTLEMEN: Yours of the 5th instant, addressed to H. N. Girard, has just been referred to us by him for attention. From the state-

ments contained in your letter there is evidently some misunderstanding upon the part of Mr. Gosnell with reference to the conversations between him and our Mr. E. S. Douglas. The object of our visit to Baltimore and also the telephone conversations on the same day had reference only to the object of our visit, which was fully explained to a member of your firm. In a former letter, addressed to the Railway Company, we called attention to the fact that the balance of the ties involved in this contract had not been delivered for the reason that the Railway Company had asked Mr. Girard to hold up shipments until further notice. We requested the Railway Company to advise us, as attorneys for Mr. Girard, when the balance of the ties were desired, and also to know the period during which these shipments were to continue. There was no desire upon our part to do other than that which was absolutely proper, both from the standpoint of Mr. Girard's interests and the interests of his creditors. Having received no reply to our inquiry, either from you or the Railway Company, we thought it our duty to treat this fact as one of the assets of the estate in bankruptcy, which has accordingly been done. Mr. Girard,
125 through us, has filed his proceedings in voluntary bankruptcy, and was yesterday adjudged a bankrupt. The question as to the status of this contract will, therefore, in our opinion, have to be taken up between you and the trustee in bankruptcy. The request made by Mr. Masterton of Mr. Girard in his letter of October 26th in our opinion has no bearing upon the legal status of the present situation.

Yours very truly,

DOUGLASS & DOUGLASS.

(Docket #3985.)

BALTIMORE, *November 7th,* 1906.

Messrs. Douglas & Douglas, Colorado Building, Washington, D. C.

GENTLEMEN: Your favor of the 6th inst. received. We must adhere to Mr. Gosnell's statement as to the conversation over the 'phone between Mr. Douglas and himself on the 30th ulto., as related in our letter of the 5th inst., and we wish to add that it is precisely the same statement that Mr. Douglas made at our office earlier in the day when Mr. Gosnell was absent in the Court of Appeals.

We note that, in your opinion, the request made by Mr. Masterton of Mr. Girard in his letter of October 26th, has no bearing upon the legal status of the present situation.

Agreeably to the request of Mr. Matthews over the tele-
126 phone this morning, we are handing you herewith a copy of the agreement dated June 16th, 1906, between the Washington, Baltimore & Annapolis Electric R'y Co. and H. N. Girard, Mr. Matthews having stated that Girard's copy of the contract had been mislaid and that he desired this copy for the Referee in Bankruptcy of Mr. Girard.

We send you this copy but we desire that you should understand

our position clearly,—that is, by reason of all the facts and circumstances that have transpired, the Company does not consider itself any longer bound by the terms of the contract, and reserves to itself the right to make all defences it may have to any claim that may be made against it in the premises by the Trustee in Bankruptcy of Mr. Girard, or any one else.

Yours very truly, FRANK GOSNELL.

(Dictated F. G.—K.)

NOVEMBER 19, 1906.

Mr. J. G. Masterton, Baltimore, Md.

DEAR SIR: I have 10 to 15,000 ties that are all ready to load and would like to sell them to you. If you need them I would like to quote you prices of them. They are 6″ to 7″ thick x 6″ face up to 8′ long. If you are in the market for any I would be pleased to hear from you. Could also furnish some white oak switch ties if you need any. Am now in a position to finance my own busi-
127 ness and can assure you that you would not have any more bother as you did have before, on the business previous. Hoping to hear from you at your convenience, remain,

Yrs. very truly, H. N. GIRARD.

(Copy.)

NOVEMBER 23, 1906.

Mr. H. N. Girard, 431 Sixth Street N. W., Washington, D. C.

DEAR SIR: Referring to your letter 19th inst.: We are not in the market at present for any crossties, otherwise would be glad to figure with you for the number you have on hand. Perhaps later we might be in position to figure with you.

Yours very truly, JNO. G. MASTERTON,
Secretary & Treasurer.

Law Offices of E. Hilton Jackson.

WASHINGTON, D. C., *December* 3, 1906.

Washington, Baltimore & Annapolis Elec. Ry. Company, 801 Maryland Trust Building, Baltimore, Md.

GENTLEMEN: I beg to advise you that I have been elected
128 trustee of the bankrupt estate of H. N. Girard, of this City.

From information in my possession, I am satisfied that the contract entered into on the 16th day of June, 1906, between yourselves and H. N. Girard has been broken by you, said breach growing out of your refusal to accept certain ties due under said contract. It seems to me, therefore, that the estate of H. N. Girard is entitled to damages from you on account of this breach which occurred prior to the voluntary bankruptcy proceedings taken by Mr. H. N. Girard.

If you have any disposition to settle this matter by compromise, I shall be glad to take it up with you; otherwise, I shall proceed as I may be advised is proper.

Yours very truly, E. HILTON JACKSON.

(3985)—H. N. Girard—Bankruptcy.

DECEMBER 4, 1906.

E. Hilton Jackson, Esq., Atty. at Law, 416 5th Street N. W., Washington, D. C.

DEAR SIR: Your letter of the 3rd instant to our client, Washington, Baltimore & Annapolis Electric Railway Company, has been handed to us for reply. We note that you have been elected trustee of the bankrupt estate of Girard, and that you say "from information in your possession you are satisfied that the contract entered into on the 16th day of June, 1906, between the Company and Girard, has been broken by the Company, the alleged breach growing out of the refusal of the Company to accept certain ties due under said contract."

129 We do not know the source of your information, but our knowledge of the facts in this case, from the very beginning, justifies us in stating that you have been misinformed by some one as to the real status of affairs. The facts in the case are substantially as follows:

Mr. Girard, not being able to finance the contract, made some arrangement with the National City Bank for financial assistance. After this arrangement was made Girard became financially involved: Numerous attachments were issued against him by his creditors in the Superior Court of this City, and these attachments were laid in the hands of the Company as garnishees. No ties were shipped after these attachments were issued. We might add, however, that at the time ties were being shipped faster than were called for by the contract. By an arrangement between Mr. Girard, the bank and the Creditors of Girard these attachments were all dissolved, and subsequently dismissed, and the money then due by the Company for ties unpaid for was paid to the bank.

Subsequently Girard showed a disposition to reship ties, and the Company would have been perfectly willing to receive them but for the fact that Girard's counsel stated that Girard was going into bankruptcy, and, as a matter of fact, he took the benefit of the bankruptcy law. The time for the shipment of the ties having expired by limitation, and neither the bank nor Girard having shown any disposition to carry out the contract, and in view of all the facts as they existed, we have advised the Company that they are not liable in the premises for any alleged breach of contract.

130 Consequently, there is no disposition upon our part to settle the matter by compromise, as you suggest.

In addition to the foregoing, we would say that we have been informed that Girard claims that he has assigned this contract to the National City Bank. This would appear from Schedule B-3 in the bankruptcy proceedings.

Yours very truly, MARBURY & GOSNELL.

(Dictated F. G.—P.)

St. Paul #780

Baltimore Terminal Company, 801 Maryland Trust Bldg., Baltimore, Md.

SEPTEMBER 4TH, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Referring to your letters 3rd inst. and conversation had with you to-day by long distance 'phone we confirm purchase of 4350 strictly first-class standard #1 chestnut cross-ties 6″ x 8″ x 8′ at 55¢ each, f. o. b. cars Mt. Clare Station, Baltimore, Md., freight prepaid, shipment to commence immediately; first car to come forward at once on your inspection. Advise point of shipment in order that we can have our inspector on the ground for the balance.

Please ship the ties to Traction Construction Co. for Baltimore Terminal Railroad, Mt. Clare Station, Baltimore, Md., via
131 B. & O. R. R. rendering bills accordingly, and arrange to mail us bills of lading same day cars move, sending invoices in duplicate promptly.

Kindly confirm on your part, and oblige,—

Yours very truly,

(Sgd.) JNO. G. MASTERTON,
Secretary & Treasurer.

Copy.

Traction Construction Company,
801 Maryland Trust Building,
Baltimore, Md.

SEPTEMBER 29, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Herewith cheque for $1359.36, in payment for eight cars cross-ties, per bills rendered, less freight, $344.16, per attached expense bills, and 19 culls, $10.64. Car B. & O. #181612 contained five culls and B. C. R. & N. #7631, fourteen culls. These cars were shipped from Clifton, Va., and ties were not inspected by our Mr. Howard.

Please receipt and return accompanying voucher, obliging.

Yours very truly,

(Sgd.) JNO. G. MASTERTON, *President.*

132 Copy.

OCT. 1, 1906.

Mr. J. G. Masterton, President Traction Construction Co., Baltimore, Md.

DEAR SIR: I am pleased to acknowledge receipt of yours of the 29th enclosing check for $1359.36 in payment for ties shipped and thank you for same.

I will be pleased if you arrange for the immediate inspection of

balance of ties due on your order. Also advise me as to when you expect to be in the market for same.

Thanking you for past favors and soliciting a continuance of same, I remain,

Yours very truly, ALBERT PRESTON.

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Building,
Baltimore, Md.

OCTOBER 1, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: We figure there is still due on account our contract with you 1289 crossties, which you may increase to 1330 and
133 arrange to ship early as possible, forwarding same as follows:

420 ties to Traction Construction Company for Baltimore Terminal Company, Mt. Clare Station, Baltimore, Md., and 910 ties to Traction Construction Company for W. B. & A. E. Ry. Co., Odenton, Md.

Please advise when you will be ready for our inspector, as we desire him to pass on the ties before they are loaded. Kindly be particular to ship exactly the number above stated to each point and not make any over-shipment in this instance, obliging.

Yours very truly,
(Sgd.) JNO. G. MASTERTON,
Secretary and Treasurer.

Copy.

OCT. 2, 1906.

Mr. J. G. Masterton, President Traction Construction Company, Baltimore, Md.

DEAR SIR: Replying to yours of the 1st would say as soon as I have cars at shipping points I will telephone you as to where to send inspector. I have the ties ready for shipment and cars are ordered for same.

Yours very truly, ALBERT PRESTON.

134 Copy.

Traction Construction Company,
801 Maryland Trust Building,
Baltimore, Md.

OCTOBER 13, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Please send us duplicate copies of your bills 10th and 11th inst. for ties shipped to Baltimore and Odenton, Md., obliging.

Yours very truly,
(Sgd.) JNO. G. MASTERTON, *President.*

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Building,
Baltimore, Md.

NOVEMBER 6, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: We confirm conversation with you today by Long Distance phone, covering purchase of 5000 strictly first class
135 standard No. 1 chestnut crossties 6″x8″x8′, at 55 cents each, f. o. b. cars A. W. & B. R. R. tracks, Odenton, Md., freight prepaid, shipment to commence immediately and be completed early as possible. Mail us bills of lading same day as cars move, sending invoices in duplicate promptly. Please advise when you are ready for inspector and we will have him report promptly. Kindly confirm on your part and oblige.

Yours very truly,
(Sgd.) JNO. G. MASTERTON,
Secretary & Treasurer.

Nov. 7, 1906.

Mr. J. G. Masterton, Sec'y & Treasurer Washington, Baltimore & Annapolis E. Ry. Co., Baltimore, Md.

DEAR SIR: Acknowledging receipt of your order of the 6th would say that I have all ties ready for immediate shipment and cars ordered for same. I will advise you as soon as I am ready for inspector.

In handling most of my contracts I assign the payment of all invoices to one of the banks with which I do business so I desire that you write a letter to the National City Bank, 1405 G Street, Washington, D. C., stating that you have placed a contract with me for a quantity of ties at 55¢ each and that you will pay direct all invoices of which I assign the payment to them.

I will prepay all freight charges and ties will be billed ac-
136 cording to the inspection and count of your representative.

Kindly send a copy of the letter to me.

Yours very truly, ALBERT PRESTON.

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Trust Building,
Baltimore, Md.

NOVEMBER 16, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: We confirm conversation with you today by Long Distance phone, increasing order given you 6th inst. to 10,000 instead of 5,000 standard No. 1 chestnut crossties, for delivery early as possible.

Yours very truly,
(Sgd.) JNO. G. MASTERTON,
Secretary and Treasurer.

137 Nov. 17, 1906.

Mr. J. G. Masterton, Sec'y & Treas. Washington, Baltimore & Annapolis E. R. R. Co., Baltimore, Md.

DEAR SIR: I am pleased to acknowledge receipt of yours of the 16th increasing order for chestnut ties to 10000. I will make arrangements to ship all these ties as fast as I can secure cars from the railroad company upon which to load same.

In your reply you neglected to mention anything relative to the 1500—7″ x 9″ x 8½′ white oak ties which I desire to deliver on your right of way near to Landover. Let me hear from you by return mail relative to this lot of ties.

Yours very truly, ALBERT PRESTON.

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Trust Building,
Baltimore, Md.

NOVEMBER 23, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Referring to your letter 20th inst.: We con-
138 firm purchase of 1500 7″ x 9″ x 8½′ white oak ties at 55¢ each, delivered on our right of way near Landover, Md., subject to our inspection. We advise soon as we have inspector available.

Yours very truly,

(S'g'd) JNO. G. MASTERTON,
Secretary & Treasurer.

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Trust Building,
Baltimore, Md.

DECEMBER 10, 1906.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Referring to our telephone conversation today: We confirm purchase additional 10,000 strictly first class standard No. 1 chestnut crossties, 6″ x 8″ x 8′, at 55¢ each, f. o. b. cars, A. W. & B. R. R. tracks, Odenton, Md.; shipment to continue following present order, and be completed early as possible.

Kindly confirm on your part, and oblige,

Yours very truly,

(S'g'd) JNO. G. MASTERTON,
Secretary & Treasurer.

139 DEC. 11, 1906.

Mr. J. G. Masterton, Sec'y & Treasurer Washington, Baltimore & Annapolis E. Ry. Co., Baltimore, Md.

DEAR SIR: I am pleased to acknowledge receipt of yours of the 10th ordering 10000 more chestnut ties to be shipped to Odenton, Md. These ties will be shipped as fast as cars can be secured upon which to load same.

Referring to telephone conversation kindly forward to me the settlement mentioned as soon as you possibly can.

Yours very truly, ALBERT PRESTON.

Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Trust Building,
Baltimore, Md.

JANUARY 4, 1907.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Herewith freight bills covering seven cars crossties, for which we handed you cheque on the 2nd inst. We confirm purchase additional 10,000 strictly first class standard No. 1 chestnut crossties, 6″ x 8″ x 8′, at 55¢ each f. o. b. cars A. W. & B.
140 R. R. tracks, Odenton, Md.; shipment to commence about 14th inst. and be completed early as possible. Kindly confirm on your part, and oblige,

Yours very truly.

(S'g'd) JNO. G. MASTERTON,
Secretary & Treasurer.

JANUARY 5, 1907.

Mr. J. G. Masterton, Washington, Baltimore & Annapolis E. Rwy. Co. Baltimore, Md.

DEAR SIR: I am pleased to acknowledge receipt of yours of the 4th enclosing freight bills for the seven cars of ties for which I received check on the 2nd inst.

I am also pleased to accept your additional order for 10000 chestnut ties.

I will appreciate it very much if you will send me check for ties shipped as soon as you receive reports from same.

Yours very truly, ALBERT PRESTON.

141 Washington, Baltimore and Annapolis Electric Railway Company,
801 Maryland Trust Building,
Baltimore, Md.

FEBRUARY 12, 1907.

Mr. Albert Preston, 321 Munsey Building, Washington, D. C.

DEAR SIR: Referring to our telephone conversation today, beg to confirm purchase 10,000 strictly first class standard No. 1 chestnut crossties, 6″ x 8″ x 8′, at 55 cents each, f. o. b. B. & O. R. R. tracks, Clifford, Md., shipments to commence early as possible.

Kindly confirm on your part, and oblige,

Yours very truly,

(S'g'd) JNO. G. MASTERTON,
Secretary & Treasurer.

MAY 23, 1907.

Mr. J. G. Masterton, Sec'y & Treasurer Washington, Baltimore & Annapolis E. Ry. Co., Baltimore, Md.

DEAR SIR: Referring to our conversation of yesterday would say on the last order I shipped twenty-six cars to Odenton containing 9836 ties and twenty-seven cars to Clifford containing 10848 ties. If you desire any further information I will be pleased to send same upon receipt of word from you.

Yours very truly, ALBERT PRESTON.

142–144 (*Copy.*)

Debtor's Petition.

Filed Nov. 5, 1906. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Court in Bankruptcy.

Filed Oct. 8, 1909. J. R. Young, Clerk.

The petition of H. N. Girard o- Washington, District of Columbia lumber dealer respectfully represents:

That he has had his principal place of business for the greater portion of six months next immediately preceding the filing of this petition at Washington within said Judicial District; that he owes debts, which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy:

That the Schedule hereto annexed, marked "A," [1, 2, 3, 4, 5,] and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the Schedule hereto annexed, marked "B," [1, 2, 3, 4, 5, 6,] and verified by your petitioner's oath, contains an accurate Inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

H. N. GIRARD, *Petitioner.*

—— ——, *Attorney.*

UNITED STATES OF AMERICA,
Washington, District of Columbia, ss:

I, H. N. Girard, the Petitioning Debtor mentioned and described in the foregoing Petition, do hereby make solemn oath that the state-

ments contained therein are true according to the best of my knowledge, information, and belief.

H. N. GIRARD, *Petitioner.*

Subscribed and sworn to before me this 30 day of October A. D. 1906.

[L. S.] C. COLDEN MILLER,
Notary Public, D. C.

All the Schedules must be filed with this Petition.

Oaths to Petition and Schedules may be made before Referees, and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken, and diplomatic or consular officers of the United States in any foreign country.

* * * * * * *

(Here follow diagrams marked pages 145, 146, 147, 148, and 149.)

152–154 No. —.

Oath to Schedule A.

In the Matter of H. N. GIRARD, Bankrupt.

UNITED STATES OF AMERICA,
Washington, District of Columbia, ss:

On this 30 day of October, A. D. 1903, before me personally came H. N. Girard, the person mentioned in and who subscribed to the foregoing Schedule, and who, being by me first duly sworn, did declare the said Schedule to be a statement of all his debts, in accordance with the acts of Congress relating to Bankruptcy.

H. N. GIRARD.

Subscribed and sworn to before me this 30 day of October A. D. 1906.

[L. S.] C. COLDEN MILLER,
Notary Public, D. C.
[Official Character.]

To be attached to Schedule A [5] after execution before proper officer.

* * * * * * *

(Here follows diagram marked page 155.)

U. S. B. C. OFFICIAL FORM—PETITION BY DEBTOR

SCHEDULE "A" 2.
CREDITORS HOLDING SECURITIES.

No. 2052
Jackson
v.
W B & A Elec RR } P. 145

Uniform Bankruptcy Blanks.
THE LAW REPORTER COMPANY, WASHINGTON, D. C.

[3]

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to Ledger or Voucher.	NAMES OF CREDITORS.	RESIDENCES. (If unknown, that fact must be stated.)	DESCRIPTION OF SECURITIES.	When and where Debts were contracted.	Value of Securities. Dollars	Cents	Amount of Debts. Dollars	Cents
	Robert S. Matthews 3276 ties assigned to said Matthews Aug. 16, 1906	Culpeper, Va	$987.- proceeds of sale of assigned ties - in hands of Corporation Court of Alexandria, Va.	July 30, 1906, at Culpeper, Va	987	00	1005	00
	National City Bank	Washington, D.C	Assignment of debts due by Wash. Balto. and Annapolis Ry. Co. for present or future advancements.	Between July 1, and Aug 9 1906, at Washington, D.C	All funds held by said Ry. Co.		4123	85
				about	4664	90		
								145
					TOTAL, 5651	90	5128	85

A. N. Girard PETITIONER.

U. S. S. C. OFFICIAL FORM—PETITION BY DEBTOR

No. 2052
Jackson &c.
v.
W. B. & A. Elec. R.R. } P. 146

SCHEDULE "A" 3. No. 1

CREDITORS WHOSE CLAIMS ARE UNSECURED.

Uniform Bankruptcy Blanks.
THE LAW REPORTER COMPANY, WASHINGTON, D. C.

[4]

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the Schedule of property.]

Reference to Ledger or Voucher.	NAMES OF CREDITORS.	RESIDENCE. (If unknown, that fact must be stated.)	WHEN AND WHERE CONTRACTED.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	AMOUNT. Dollars.	Cents.
	R M Moncure	Rectory, Va	Aug 4, 1906, at Widewater, Va	5110 ft. lumber	51	10
	R C L Moncure	Stafford, Va	Between Oct 26, 1905 and Feb 20, 1906, at Widewater, Va	Balance due on railroad ties bought of said Moncure	40	00
	Miss Picket Wallis	Widewater, Va	Aug 4, 1906, at Widewater, Va	2300 ft. of lumber at $10 per thousand	23	00
	J W. Masters	Fredericksburg, Va	Between July 23 and Aug 3, 1906, at Fredericksburg, Somerset Beach and Potomac Creek, Va	About 10,000 R.R ties bought of said masters	1329	00
	H. S. Atkins	Orange, Va	July 21, 1906, at Orange, Va	357 ties	107	10
	Carter and Clark	Washington, D.C.	Aug. 13, 1906, at Washington, D.C.	Protested check	850	00
	Wesley Knight & Co.	Stafford C. H., Va	Between July 16 and Aug 3, 1906, at Alex, Va	1871 ties	736	22
	S. B. Stonnell	Woodbridge, Va	Between Aug 3 & Aug 11, 1906, at Alex, Va	1004 ties	344	80
	W. I. Sutherland	Cross Roads, Md	July 12 to Aug 16, 1906 at Liverpool, Md	968 ties	387	20
				TOTAL,	3868	42

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H. N. Girard.
PETITIONER.

U. S. S. C. OFFICIAL FORM—PETITION BY DEBTOR

No. 2082
Jackson &c
v.
to B. & O. R. R. } P. 147

SCHEDULE "A" 3. Sheet No. 2.

CREDITORS WHOSE CLAIMS ARE UNSECURED.

Uniform Bankruptcy Blanks.
THE LAW REPORTER COMPANY, WASHINGTON, D. C.

[4]

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the Schedule of property.]

Reference to Ledger or Voucher.	NAMES OF CREDITORS.	RESIDENCE. (If unknown, that fact must be stated.)	WHEN AND WHERE CONTRACTED.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	AMOUNT. Dollars.	Cents.
				Forward	3868	42
	W. V. Moore,	West End, Va.	Aug. 13, 1906, at Washington, D.C.	Protested check	27	00
	Curtin & Brockie	Philadelphia, Pa.	Between July 1 and Aug. 16, 1906	Insurance on Schooner "Montague" & Barge "Louisa"	85	20
	J. & H. Aitcheson	Alexandria, Va	Between July 1 and Aug. 30, 1906 at Alex. Va.	Bill of goods, as rendered.	20	00
	Western Union Tel. Co.	Washington, D.C.	Between June 1 & Aug. 31, 1906, at Wash., D.C.	Telegraph service.	39	00
	Andrew B. Duvall	Washington, D.C.	about June 15, 1906, at Wash. D.C.	Legal services	25	00
	Ches. & Potomac Tel. Co.	Washington, D.C.	July 1 to Aug 29, 1906 at Wash., D.C.	Telephone services	91	00
	Peoples Nat Bank of Manassas, Va.	manassas, Va	Between April 26 and Aug 3, 1906, at Manassas, Va.	Eight certain notes made by petitioner & dishonored	2000	00
	Herbert Wingfield	Charlottesville, Va	Between July 1 and Aug 28, 1906, at Charlottesville, Va.	Bal. due on ties as per bill rendered.	85	56
	Jos R. Girard.	Hope Valley, R. I.	From July 16 to Aug 30, 1906, at Widewater, Va	Manufacturing ties, and cash advanced	211	08
				TOTAL,	6702	26

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H. N. Girard.

PETITIONER.

U. S. S. C. OFFICIAL FORM—PETITION BY DEBTOR

Jackson No. 2082
v.
Wilcox 188 F. 148

SCHEDULE "A" 3

Sheet No. 3

Uniform Bankruptcy Blanks.
THE LAW REPORTER COMPANY, WASHINGTON, D. C.

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS, OR INDORSERS.

[5]

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to Ledger or Voucher	NAMES OF HOLDERS AS FAR AS KNOWN.	RESIDENCE. (If unknown, that fact must be stated.)	PLACE WHERE CONTRACTED.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and if so, with whom.	AMOUNT. Dollars.	Cents.
				Forward	6702	26
	John Hunt	Landover, Md	Between April and Aug. 31, 1906, at Widewater, Va.	Hauling logs & ties	350	00
	Thomas Shackelford	Rectory, Va	July 19 to July 21 1906 Widewater, Va	1100 R. R. ties	371	18
	A. J. Pike	Widewater, Va	Between Dec 1, 1905 and April 18, 1906 at Widewater Va	Timber bought	102	41
	E. S. Pickett	Alexandria, Va	July 24, 1906, at Widewater Va	274 ties - bal due	15	00
	Apex Equipment Co	11 Broadway N. Y. City	Between Aug. and Oct. 11, 1906, at N. Y.	Bal. due as per statement rendered	406	50
	Jos. A. Hurd Lumber Co.	14 Kilby St. Boston Mass	Aug 9, 1906, at N. Y.	Bal due as per statement rendered	299	40
	Cary Machinery and Supply Co	Baltimore, Md	Aug 17, 1906 at Balto, Md	Belts Shipped as per bill rendered	59	61
	R. Hoe & Co.	504 Grand St., N. Y. City	Aug 12, 1906, at N. Y.	Machinery furnished	15	00
	Osborne Company	N. Y. City	June 25, 1906 at Wash, D. C.	Calendars furnished	53	00
	P. Dougherty Co	Baltimore, Md	June 1 to July 1906 at N. Y.	Demurrage on barge "Pacific"	150	00
				TOTAL,	8524	36

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PETITIONER.

U. S. S. C. OFFICIAL FORM—PETITION BY DEBTOR Jackson no. 287 v W. B. & A. Elec. RR. Pg. 149

Uniform Bankruptcy Blanks. THE LAW REPORTER COMPANY, WASHINGTON, D. C.

SCHEDULE "A" ~~4.~~ 3 Sheet No. 4

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS, OR INDORSERS.

[5]

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to Ledger or Voucher	NAMES OF HOLDERS AS FAR AS KNOWN.	RESIDENCE. (If unknown, that fact must be stated.)	PLACE WHERE CONTRACTED.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and if so, with whom.	AMOUNT. Dollars.	Cents.
				Forward	8524	36
	F. F. Burroughs Son & Co	Alexandria, Va	Aug. 15 to Aug. 30 1906, at Alex., Va	Grain shipped	35	62
	Peter S Carter, Atty for B & Wasson	29 Broad St. N. Y.	July, 1906 at Alex, Va	Demurrage on Schooner "H. H. Chamberlain"	26	50
	Chas S Cooper, Agent	Herndon, Va	May 1906, at Herndon, Va	Bal. due on freight bill	2	18
	J. T. Selecman	Occoquon, Va	July 1906, at Alex. Va	Tow bill	3	00
Pay =	W. U. Thompson,	Vienna, Va	Aug. 15, 1906, at Vienna, Va	Protested check	682	80
	Max C. J. Wiehle	Wiehle, Va	July 11 to Aug. 1, 1906 at Washington, D.C	Bal due on unpaid notes	174	66
	T. A. Owens	c/o J. C. Davis Atty Columbian Bldg Wash., D.C		Protested check	114	00
				TOTAL,	9563	12

H. N. Girard
PETITIONER.

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No. ....

Uniform Bankruptcy Blanks.
THE LAW REPORTER PRINTING CO., WASH., D. C.
[10]

In the Matter of H. N. Girard ...., **Bankrupt.**

No. 2082
Jackson re
+
W B & A Elec RR } P. 156

SCHEDULE "B" 3.

[This Schedule must be executed in Triplicate.]

CHOSES IN ACTION.

General Head.	ITEMIZED LIST OF PERSONAL PROPERTY.	Dollars	Cts.
a. Debts due petitioner on open account.	Washington Marshall, Paris, Va.	10	00
	James McDonald, Markham, Va	102	60
	Will Beavers, Willard, Va	15	00
	Samuel Mills, Alex. Va.	43	37
	Ecclestone Lumber Co., 44 Broadway N. Y. City	318	19
b. Stocks in incorporated compames, interest in joint stock companies, and negotiable bonds.	Arthur Lemon, Widewater, Va	11	00
	Kirby and Hawkins Co., 322 Arcade Bldg, Philadelphia Pa	251	50
	Daniel M. Lee, Fredericksburg Va	2259	32
	Edmund Whittaker, 37 Zabrife St Haldeon, N. J.	140	00
c. Policies of insurance.	Capt. J. N. Smith & owners of Schooner "Wm P. Hood" Leighton, Mass	162	00
	Valley Tie & Lumber Co, Staunton, Va	412	30
	J. S. Norton, Schooner "Nettie", Alex Va., c/o Wm P. Graves Jr	48	32
d. Unliquidated claims of every nature, with their estimated value.	Southern Ry. Co. Wash, D. C (over charges on freight bills)	2773	93
	Richmond, Fredericksburg & Potomac Ry Co. Richmond Va (over charges on freight bills)	214	76
	Contract for 75000 ties to be furnished to the Wash. Balto. & Annapolis Electric Ry Co. - about 27,000 have been furnished and paid for, leaving a balance of about 48,000 ties on which a profit of about 10¢ per tie could be realized		
e. [illegible]	Jas. Bradley, Clifton, Va	78	00
	Wash. Balto & Annapolis Ry Co. (assigned to Nat City Bank)	about 4664	90
	TOTAL	11,505	19

H. N. Girard
Petitioner.

156–159 No. —.

Oath to Schedule B.

In the Matter of H. N. GIRARD, Bankrupt.

UNITED STATES OF AMERICA,
Washington, District of Columbia, ss:

On this 30 day of October, A. D. 1906, before me personally came H. N. Girard, the person mentioned in and who subscribed to the foregoing Schedule, and who, being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to Bankruptcy.

H. N. GIRARD.

Subscribed and sworn to before me this 30 day of October A. D. 1906.

[L. S.] C. COLDEN MILLER,
Notary Public, D. C.
[Official Character.]

To be attached to Schedule B [6] after execution before proper officer.

160 *Summary of Debts and Assets.*

[From the Statements of the Bankrupt in Schedules A and B.]

[Petition by Debtor.]

Schedule A. 1 (1)	Taxes and debts due United States..	
Schedule A. 1 (2)	Taxes due States, Counties, Districts, and Municipalities	$6.80
Schedule A. 1 (3)	Wages	586.48
Schedule A. 1 (4)	Other debts preferred by law.....	
Schedule A. 2	Secured claims	5,128.85
Schedule A. 3	Unsecured claims	9,563.12
Schedule A. 4	Notes and bills which ought to be paid by other parties thereto....	450.00
Schedule A. 5	Accommodation Paper.....	
	Schedule A, total.....	$15,735.25

Schedule B. 1	Real Estate	
Schedule B. 2–a	Cash on hand	$310.23
Schedule B. 2–b	Bills, Promissory Notes, and Securities	
Schedule B. 2–c	Stock in Trade.....	350.00
Schedule B. 2–d	Household Goods, &c.	

Schedule B. 2–e	Books, Prints, and Pictures.....	
Schedule B. 2–f	Horses, Cows, and other animals....	
Schedule B. 2–g	Carriages and other vehicles.....	
Schedule B. 2–h	Farming stock and Implements....	
Schedule B. 2–i	Shipping and shares in vessels.....	
Schedule B. 2–k	Machinery, Tools, &c.	
Schedule B. 2–l	Patents, Copyrights, and Trade-marks	
Schedule B. 2–m	Other Personal Property.....	
Schedule B. 3–a	Debts due on open accounts.....	11,505.19
Schedule B. 3–b	Stocks, Negotiable Bonds, &c.....	
Schedule B. 3–c	Policies of Insurance.....	
Schedule B. 3–d	Unliquidated Claims	
Schedule B. 3–e	Deposits of money in banks and elsewhere	
Schedule B 4	Property in Reversion, Remainder, Trust, &c.	
Schedule B. 5	Property Claimed to be Exempted..	
Schedule B. 6	Books, Deeds, and Papers.....	
	Schedule B, total.....	$12,165.42

H. N. GIRARD, *Petitioner.*

161 [Endorsed:] No. 472, Docket —. Supreme Court, D. C. In the Matter of H. N. Girard, Bankrupt. In Bankruptcy. Before —— —— Referee. Filed 10:05 o'clock A. M. this 5th day of Nov. 1906 J. R. Young Clerk, by F. E. Cunningham Deputy Clerk. Douglas & Douglas Attorney- for Bankrupt. Address — Trustee —— ——. Address —. Filed Nov. 5, 1906. J. R. Young clerk.

162 The plaintiff, at the conclusion of the testimony, requested the Court to give the jury the following four instructions:

Plaintiff's Prayer, No. 1.

If the jury believe from the evidence that the defendant, by its acts and conduct, showed an intention not to be bound by the contract which it had entered into with Henry N. Girard on the 16th day of June, 1906, then the said Girard had the right to treat said contract as abandoned by said defendant, and to bring suit for the recovery of damages at any time thereafter, unless you believe from the evidence that the defendant company receded from such intention not to be bound prior to the time when the said Girard chose to treat said contract as abandoned by the defendant. An intention can only be known by acts, conduct, or declaration. Your inquiry in this connection is:

First. Did the defendant, by acts and conduct, violate the substantial terms of said contract, and commit a breach, or breaches, in substantial provisions thereof?

Second. Did such acts and conduct, if you believe from the evidence they existed, warrant the conclusion that they would be continued, and that it was the intention of the defendant to continue such acts and conduct?

Plaintiff's Prayer No. 2.

If the jury believe from the evidence that the defendant company refused to, and did not, live up to its said contract, in its substantial provisions, and refused to perform it according to its terms, and abandoned the same without the fault of said Girard,
163 and that the defendant company prevented said Girard from performing the substantial provisions of said contract according to its terms, then the plaintiff is entitled to recover; and it is not necessary that the said Girard should have been prevented from performing said contract by physical force, in order to give him the right to treat said contract as abandoned by the defendant company, and the plaintiff the right to recover damages from said defendant company in this action. If the jury believe from the evidence that said defendant railway refused to, and did not, live up to its said contract, and refused to perform it according to its terms, and if you believe from the evidence that the defendant company defeated the substantial object of the said contract, or rendered it unattainable by proper performance on the part of said Girard, and that defendant prevented Girard from performing the said contract according to its terms, as above suggested, then the jury may find for the plaintiff, and assess the damages at such a sum as they believe from the evidence that the said Girard has suffered by reason of such breach.

Plaintiff's Prayer No. 3.

The jury are instructed that a specific refusal to perform or to have anything more to do with the contract is a breach by renunciation; and that renunciation by one party excuses the other from any further offer to perform the contract. If, therefore, you shall believe from the evidence that the defendant company specifically refused to perform or to be bound by the terms of its said contract of June 16th, 1906, with said Henry N. Girard while the said Girard was ready, willing and able to perform said contract on his
164 part, then such action on the part of the defendant company constitutes a breach of said contract on its part, and rendered it unnecessary for the said Girard to make any further offer to perform on his part, even if you shall believe from the evidence that he did not as a matter of fact make such further offer.

Plaintiff's Prayer No. 4.

The court instructs you that if your verdict shall be for the plaintiff, then he is entitled to recover such damages as you shall believe from the evidence the said Girard sustained by reason of the defend-

ant's breach of said contract; and in estimating such damages you may take into consideration:

First. The loss of such profits as you shall believe from the evidence the said Girard would have made upon such undelivered ties as you shall believe from the evidence he was prevented by the defendant company from delivering under his said contract; *provided,* however, that if you shall believe from the evidence that said Girard, acting in good faith, sold said undelivered ties, or any portion thereof, to other parties at a profit, then in that event the amount of profits so made must be deducted from the profits on such undelivered ties had he delivered them to the defendant company at the price, or prices, named in said contract.

Second. You may also take into consideration such further loss as you shall believe from the evidence the said Girard sustained by reason of his selling, in good faith, said undelivered ties, or
165 any portion thereof, to other parties at an actual loss.

Prayers of Defendant.

The defendant requested the Court to give the jury the following twenve instructions:

1.

The jury are instructed under all the evidence in the case to return a verdict herein for the defendant.

2.

The jury are instructed that the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence, the material allegations of the declaration.

3.

The jury are instructed that requests made by defendant to said Girard to ease up or suspend shipments of ties under the contract sued on herein, even though the same may have resulted in a slower or less rate of delivery than as called for by the contract, cannot be relied on by plaintiff herein as a breach of contract by defendant, in so far as said Girard waived such contract provision, by his acquiescence in such slower or less rate of delivery, provided the jury shall find that said Girard did so, in fact, acquiesce therein.

4.

The jury are further instructed, if they shall believe from all the evidence, that after the certain contract embraced in these
166 proceedings was entered into between Girard and defendant, and prior to complete and full performance thereof by said Girard, the latter, (by his attorney and agent in that behalf,) advised defendant, (through its attorney and agent in that behalf,) that he was about to go into voluntary bankruptcy, and that he would be unable and unwilling to supply any further ties, and that

said then existing contract would terminate, and that said Girard did, thereafter, go into voluntary bankruptcy, leaving the said contract unperformed; and that, thereafter neither said Girard, nor the plaintiff herein, his trustee in bankruptcy, performed or tendered his willingness and ability to perform said contract, then, and in such event, your verdict herein should be for the defendant.

5.

The jury are instructed, if they shall believe from all the evidence, that, after the certain contract embraced in this suit was entered into, the said Girard, (by his attorney and agent in that behalf,) applied to defendant, (through its attorney and agent in that behalf,) to terminate and rescind the same, and that said termination and rescission thereof was thereupon and thereafter acquiesced in by said defendant, the said contract was thereby put an end to and terminated; and, in such event, neither the said Girard, nor the plaintiff herein, as trustee in bankruptcy of said Girard, would be entitled to recover any damages from said defendant for its failure or refusal to thereafter carry out said contract.

6.

The jury are further instructed, if they shall believe from
167 all the evidence, that said Girard did in fact advise defendant that he would be unable to supply any further deliveries under said contract, that constituted a breach of contract by said Girard, and that, thereupon and thereafter, defendant had the legal right to make purchase of its required ties elsewhere, without any liability therefor either to Girard, or to plaintiff herein, as his trustee in bankruptcy.

7.

The jury are further instructed that there is no evidence in this case of any tender of performance of the contract by plaintiff herein, trustee in bankruptcy of said Girard, and that unless the jury shall believe, from all the evidence herein, that said Girard was ready, able and willing to perform the contract prior to his bankruptcy, and that defendant refused to accept ties and pay for some according to the terms of said contract, their verdict must be for defendant.

8.

The jury are further instructed that if they shall find, from all the evidence in the case, that on or prior to July 16, 1906, said H. N. Girard transferred and assigned to the National City Bank, of Washington, D. C., all of his right, title and interest in and to all moneys due and to become due under the certain contract aforesaid, for a then present fair and valuable consideration, and with no intent on his part to hinder, delay or defraud his creditors, or any of them, said Bank being such assignee thereof in good faith,
168 and that said assignment thereupon and thereafter was acquiesced in by all said parties, including the defendant

herein; then, and in such event, the title to the cause of action sued on herein did not, by operation of law or otherwise, pass to or vest in the plaintiff herein as trustee in bankruptcy of said Girard, and plaintiff cannot recover in this action.

And, in this connection, the Court instructs the jury that the validity of such transaction between said Girard and the Bank is presumed by the law; and that the burden of proving the same to be, in fact, fraudulent or with intent to hinder, delay or defraud creditors of said Girard, is upon the plaintiff.

9.

The jury are further instructed that even if they shall believe from all the evidence in the case that defendant herein was guilty of a breach of the contract sued on herein, that fact would not, in and of itself, excuse the said Girard from using every reasonable effort and endeavor to protect himself from loss arising by reason of such breach; and if the jury shall find that if, by performing that duty, the loss from defendant's breach of the contract would have been mitigated, and that said Girard, in fact, failed to perform that duty, the plaintiff herein is not entitled to recover any damages or losses which the jury may find would have been avoided, if any, by the performance of such duty of said Girard.

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10.

The jury are instructed that the measure of damages in the case of a breach of contract such as is involved in this suit is the difference between the contract price and the market value of the cross and switch ties at the time and place of delivery fixed by the contract.

11.

The jury are instructed that the measure of damages in the case of a breach of contract such as is involved in this suit is the difference between the contract price and the market value of the cross and switch ties at the time and place of delivery fixed by the contract; and in the event the jury should find that there was no other then market therefor at said place, then such measure of damages would be the difference between the contract price of said commodities at such time and place and the market value of like commodities in the nearest available market, less the additional cost, if any, of delivery from such point of delivery to the nearest market.

12.

The jury are further instructed, if they shall find from all the evidence that the market value of the cross and switch ties involved herein, at the time and place of delivery as fixed by the contract; or, if there was no other then market therefor at the place of delivery as so fixed by the contract, the market value of like commodities in the nearest available market, less the additional cost, if any,

170 of delivery from such point of delivery to the nearest market; was equal to the price fixed by the contract involved herein, then their verdict herein should be for defendant.

The prayers offered by the plaintiff were objected to by the defendant, and those offered by the defendant were objected to by the plaintiff. Whereupon, the Court took all of the prayers asked for by both the plaintiff and defendant, and, after examining the same, without granting either or any thereof, ruled as follows:

Ruling on Motion to Direct a Verdict.

The COURT (Mr. Chief Justice CLABAUGH): Gentlemen, this case, so far as the law is concerned, has been a most interesting one, and I must say it has been one of the most agreeable cases, speaking personally, that I have had occasion to try since I have been on the Bench, so far as the attorneys in the case are concerned. There have been no foolish objections, and I think counsel have gotten out of the case on both sides everything that is in it. I say this in grateful appreciation of the efforts on the part of the lawyers to get at the law and the facts of the case without constant bickering and objections which have nothing in them half the time and which only tend to confuse. Therefore, I want to acknowledge to the attorneys on both sides the pleasure that the whole case has given the Court in the way in which it has been conducted.

The case presents a good many interesting points in law, and, I am frank to say, some very difficult questions.

171 The question whether or not there was a breach in this case, it seems to me, ought to be left to the jury. In other words, if the jury should find that when the defendant company refused to send an inspector there to look over or inspect these ties, they did so because of the notice of the defendant company that he was about to file bankruptcy proceedings upon that day, and that they advised the bankrupt, as testified, on the first day of November, through the telephone, that their refusal was based upon the statement that he had applied for the benefits of the Bankruptcy Act, and if they should further find that at the time it was not denied by the bankrupt that he had taken the benefit of the insolvent law, that they had refused to send the inspector because, believing he had applied for the benefits of the Bankruptcy Act, they could then have no proceedings against him, then in my judgment the defendant company would be justified in refusing to send inspectors there, because if the bankruptcy petition was filed, that ended any right that the bankrupt had over the ties in question and over this contract, and consequently up to that point the defendant company, it seems to me, was thoroughly justified, if the jury should so find the facts, which I am frank to say are almost uncontroverted, in failing to send inspectors there.

So it looks to me as if that feature of the case is a feature that technically the Court ought to submit to the jury, though I cannot see how there could be but one finding so far as that is concerned.

Then as to the other view of the case, that this claim had been assigned, I do not think the Court would be justified, as a

172 matter of law, in saying that if there were a breach of the contract, the plaintiff cannot recover for that breach because there was no assignment of the contract. The contract still seems

herein; then, and in such event, the title to the cause of action sued on herein did not, by operation of law or otherwise, pass to or vest in the plaintiff herein as trustee in bankruptcy of said Girard, and plaintiff cannot recover in this action.

And, in this connection, the Court instructs the jury that the validity of such transaction between said Girard and the Bank is presumed by the law; and that the burden of proving the same to be, in fact, fraudulent or with intent to hinder, delay or defraud creditors of said Girard, is upon the plaintiff.

9.

The jury are further instructed that even if they shall believe from all the evidence in the case that defendant herein was guilty of a breach of the contract sued on herein, that fact would not, in and of itself, excuse the said Girard from using every reasonable effort and endeavor to protect himself from loss arising by reason of such breach; and if the jury shall find that if, by performing that duty, the loss from defendant's breach of the contract would have been mitigated, and that said Girard, in fact, failed to perform that duty, the plaintiff herein is not entitled to recover any damages or losses which the jury may find would have been avoided, if any, by the performance of such duty of said Girard.

169 10.

The jury are instructed that the measure of damages in the case of a breach of contract such as is involved in this suit is the difference between the contract price and the market value of the cross and switch ties at the time and place of delivery fixed by the contract.

11.

The jury are instructed that the measure of damages in the case of a breach of contract such as is involved in this suit is the difference between the contract price and the market value of the cross and switch ties at the time and place of delivery fixed by the contract; and in the event the jury should find that there was no other then market therefor at said place, then such measure of damages would be the difference between the contract price of said commodities at such time and place and the market value of like commodities in the nearest available market, less the additional cost, if any, of delivery from such point of delivery to the nearest market.

12.

The jury are further instructed, if they shall find from all the evidence that the market value of the cross and switch ties involved herein, at the time and place of delivery as fixed by the contract; or, if there was no other then market therefor at the place of delivery as so fixed by the contract, the market value of like commodities in
the nearest available market, less the additional cost, if any,
170 of delivery from such point of delivery to the nearest market;
was equal to the price fixed by the contract involved herein, then their verdict herein should be for defendant.

The prayers offered by the plaintiff were objected to by the defendant, and those offered by the defendant were objected to by the plaintiff. Whereupon, the Court took all of the prayers asked for by both the plaintiff and defendant, and, after examining the same, without granting either or any thereof, ruled as follows:

Ruling on Motion to Direct a Verdict.

The COURT (Mr. Chief Justice CLABAUGH): Gentlemen, this case, so far as the law is concerned, has been a most interesting one, and I must say it has been one of the most agreeable cases, speaking personally, that I have had occasion to try since I have been on the Bench, so far as the attorneys in the case are concerned. There have been no foolish objections, and I think counsel have gotten out of the case on both sides everything that is in it. I say this in grateful appreciation of the efforts on the part of the lawyers to get at the law and the facts of the case without constant bickering and objections which have nothing in them half the time and which only tend to confuse. Therefore, I want to acknowledge to the attorneys on both sides the pleasure that the whole case has given the Court in the way in which it has been conducted.

The case presents a good many interesting points in law, and, I am frank to say, some very difficult questions.

171 The question whether or not there was a breach in this case, it seems to me, ought to be left to the jury. In other words, if the jury should find that when the defendant company refused to send an inspector there to look over or inspect these ties, they did so because of the notice of the defendant company that he was about to file bankruptcy proceedings upon that day, and that they advised the bankrupt, as testified, on the first day of November, through the telephone, that their refusal was based upon the statement that he had applied for the benefits of the Bankruptcy Act, and if they should further find that at the time it was not denied by the bankrupt that he had taken the benefit of the insolvent law, that they had refused to send the inspector because, believing he had applied for the benefits of the Bankruptcy Act, they could then have no proceedings against him, then in my judgment the defendant company would be justified in refusing to send inspectors there, because if the bankruptcy petition was filed, that ended any right that the bankrupt had over the ties in question and over this contract, and consequently up to that point the defendant company, it seems to me, was thoroughly justified, if the jury should so find the facts, which I am frank to say are almost uncontroverted, in failing to send inspectors there.

So it looks to me as if that feature of the case is a feature that technically the Court ought to submit to the jury, though I cannot see how there could be but one finding so far as that is concerned.

Then as to the other view of the case, that this claim had been assigned, I do not think the Court would be justified, as a

172 matter of law, in saying that if there were a breach of the contract, the plaintiff cannot recover for that breach because there was no assignment of the contract. The contract still seems

to have been in the hands of the bankrupt and went by his assignment to his trustee, and if he realized any damages by reason of any breach, if there were a breach, it would go with certain equities attached to it, equities in favor of the bank, if when the judgment was settled there was any equity due that bank at all. I could not say that, as a matter of law, because there was an assignment then, which it develops was an assignment for the purpose of securing the bank a certain claim, and, therefore, when that claim was paid by operation of law, it would have resulted in the profits realized being held by the bank for the benefit of the bankrupt, or for Girard, and then, if he was a bankrupt, of course, for his creditors. So by operation of the law, it seems to me, the trustee here would be the proper person to sue if there were a breach of the contract.

So that, it seems to me, the Court would be compelled to submit the case to the jury upon that theory. Then it would simply leave the case in this attitude: What damages were sustained by the bankrupt or his trustee by reason of the breach of the contract on the part of the defendant company, if the jury should find there was a breach?

Then you come to the most vexed part of this question. It has been a vexed question for a great many years. After examining some of the Maryland authorities, I see they refused to decide it,

and, so far as I know, they have not yet decided the question
173 of damages in these cases; but I have arrived at a conclusion
in the light of the decision of the Supreme Court, and I

think counsel have already received the impressions I have and the conclusions at which I have arrived after a very deliberate consideration of all the varying questions and the arguments of counsel in the case, which have been very helpful to the Court.

But it does seem to me, as I intimated a few minutes ago, that there are certain definite principles of damages which have been laid down effectually by the courts. If I understand the decision of the Supreme Court in 121 U. S., there is a clear distinction between damages for articles which are manufactured and damages for the mere breach of the sale of personal property. There cannot be any doubt in my mind about it. I think the decision in 178 U. S. confirms that view as effectually as it can be confirmed by their own reference; so that it comes within those settled rules of law, as I see them. The rule to be applied is dependent, largely, upon the facts and conditions of each given case.

Now, taking up that case in 178 U. S., they recognize the rule, but they say there must be some other way in this case to get at the damages; and the opinion is largely taken up with the question whether or not you can bring a suit and recover damages, anticipating the conclusion of the contract or the time of its completion. That is the whole burden of that case. It is not upon the question of damages, because they seem to concede the question of damages.

They decide effectually in that case, it seems to me, that a recovery

can be had for an anticipated completion of the contract,
174 where the breach occurs before a thing has been done under
it. Where a party starts, for instance, to carry out a con-

tract, and the other side simply says, "I won't have anything to do with it; I won't be bound by it," the Court says, "You do not have to go on and do it, then. That is the end of it. It would be perfectly useless for you to spend five years, or effort and time and money, and take all the chances. It would be against any reason of the law and of the rule." They say, "You can sue; but how are you going to get the damages. on what principle? If you can show to the Court anything that will demonstrate certainly just what those damages are, we say the Court is justified in allowing those damages, provided they are not speculative, or anything of that kind."

In this case five years were to elapse before the completion of the contract. It was practically repudiated almost at its inception; certainly very early in the life of the contract. The principle is the same, no matter how early it is repudiated. The plaintiff in that case, as showing the damage that he had sustained, offered evidence tending to show that the damages claimed could be perfectly well ascertained, because he had contracted with sub-contractors, who took from his shoulders the burden of waiting for that time to elapse, and who were willing to take it at a given price. The Court said, "If we follow the rule that the rate of damages is the difference between the market value and the contract price, we cannot allow damages to be entered in this case, because the market price cannot be determined until the end of the five years, and we would be placed in the position of saying you can sue and recover for
175 a breach, but you cannot have any damages, because we would not know what the market price might be at the completion of the contract, which would, of course, put the Court in an anomalous position. Now, is there any other way we can get at the damages? Yes; somebody else is willing to wait until the termination of that time. He will complete the contract, and has contracted with the party to take it at a given profit to the plaintiff."

Now, an ascertained value is placed upon the contract to the original party. The Court sees what it would be worth to him. It is true it might not have been worth that much at the end, if he had followed the rule of law, which says it is the market value. It perhaps might not be worth that much if you waited until the termination of the time and sold it at the market price. The Court says, "That may be true; but still if he shows now it is worth that much to him and you, the defendant, have prevented him from realising it, and whilst it might have been better if you had waited, still the Court will not say that they must wait for all this time. *Non constat,* you might be insolvent, and everybody else might be insolvent, and not realize anything at all. Therefore, to get at the actual value of the contract rights to the plaintiff, we think he has established it by showing what that contract was worth to him at that given time."

Therefore, they did not vary the rule and the law at all, but they simply modified the rate of damages because of the peculiar conditions, and said, "You having established a rate that it must
176 be perfectly plain was a fair rate, we think there has been a sufficient statement of damages," and they allowed them at that rate; but they did not vary any principle of law.

How does that affect the case here The question here is, if there be a breach, what would the plaintiff be entitled to recover? It is perfectly clear to my mind that this is not a manufactured article, in the sense, for instance, of the Eberly case, which was a case of a contract made with a chemical company to furnish a certain number, I think a thousand tons, of phosphate, made under a particular formula under which they wanted the phosphate to be made. Wainwright might have thought it was the best kind of formula. The chemical company might have thought it was the worst on earth. Still, he wanted it that way, and contracted to make it. He violated his contract, and would not have it, and they sued him. The Court said the rate of damages was the difference between the profit he would have realized over and above the cost of manufacture, which is a perfectly equitable, fair, reasonable rule of damages.

But I cannot think it is possible that that rule should apply to the sale of ties, which as disclosed in this case, are a perfectly well-known commodity, there being certain given rules for the making of the ties, universal to all the electric roads, as shown in the testimony here, except in three instances. They made a tie that was a common thing on the market, and they contracted to sell to the defendant company seventy-five thousand ties, or whatever the number was. That was a merchantable article, if I may be properly understood by using that word, an article common on
177 the market. Here were men dealing in it, selling it to everybody, men whose business it was to buy and sell ties and to make them. Therefore, it was a well-known merchantable article, and consequently it does not occur to me, as I think it has not occurred to counsel, from their argument, that this was a manufactured article. It was a mere sale of personal property.

Now, you have violated the contract, and you are liable in damages. For how much? The rule being that it is personal property, you are liable for any difference that may exist between the contract price of the article and the market value of that article. That is what you are liable for under the general rule.

Now, what have you to show? To do that you must show that you have had on hand, ready for delivery—because the time has elapsed for the completion of the contract—those seventy-five thousand ties. In this case, of course, some have been delivered, but say forty-five thousand. Now, have you those forty-five thousand ties? Are you in a position to deliver them? For the purpose of measuring the damages, you must assume that he had forty thousand ties on hand at that time.

Then the other question would come in as to whether he was in a position to fill his contract; but, conceding for the purposes of the case, the most advantageous position that the plaintiff can occupy in this case, that you have those forty thousand ties to deliver—he says he did; he had either manufactured them or he had bought them—your duty is to sell them. If you only sell a part and keep the
178 others, then you fail in your duty to sell them all. Selling them all, what profit have you lost? What was the difference

between the market price of those ties and the contract price? From the evidence there does not appear to be any, and counsel has very frankly conceded that if the Court should find in this case that the rule of damages is the market value of the ties, then there is no damage done, because the market value is shown, by all the evidence, to be about the contract price.

So that, arguing this case from every standpoint, finding that the rule of damages is as I have endeavored to explain, and which is quite satisfactory to my own mind, I thoroughly agree with counsel that if they had made contracts and it could have been shown in this case that this man had contracted for ties and that he had paid for those ties, and by reason of the breach of this contract was not permitted to take those ties and could not take them because of the failure on the part of the defendant company, and that he could have been sued and damages recovered against him—I have not the slightest doubt in my mind if such a case were presented, just as in the case in 178 U. S., he would be entitled to recover any loss he had sustained by reason of the breach of the contract. In other words, I do not think the fact that he would buy them would make any different case from that of manufactured articles. That would be rightly considered a part of the damages in a case of this kind.

But that is not in this case, and I am not undertaking to say that the case put up by Mr. Slater would be governed by the rule of law I am now announcing. Of course, I am not deciding
179 anything that is not before me; but it seems to be an unreasonable rule to be applied in such cases as that. The facts in this case, are entirely different. It does not present any different question, and the best that can be said, taking the view of the plaintiff in this case, that he was in a position to deliver the forty thousand ties, is that his contract price being the same as the market price, he has not been damaged. Hence it would follow, as a necessity, that even though the jury may find for the plaintiff, they could not assess more than nominal damages. That is the view I must take about the case.

Now, the difficulty about it is that the jury may find for the plaintiff. From what I have endeavored to state, they may find a breach. Well, if there is a breach, then nominal damages must follow the breach, which would be one cent, or one dollar, perhaps; but there is no substantial damage, and we are in the position of having the possibility that the jury might find for the plaintiff and yet, under the rulings, could not find more than nominal damages. That is what I have seen in this case as it has been going along.

I cannot see how the Court can say there was no breach. I think that is a question of fact; and I cannot see that the fact that the profits, whatever they are, are to go to the bank, would give the Court the right to say that the trustee did not have the right to sue on the contract, and then the profits, whatever they were, would be for the benefit of whoever was entitled to that money, which appeared to be the bank, but now I suppose they would go to the creditors.
180 The only question is whether you will consent to a verdict for nominal damages.

Mr. GOSNELL: I think we would, your Honor. Pardon me one minute. Of course, your Honor, if the jury should find there was no breach, then the verdict would be for the defendant?

The COURT: Yes; if there was no breach, then the verdict will be for the defendant, of course, and the only question is whether, for the sake of nominal damages, you want to take time to argue the case.

Mr. GOSNELL: Your Honor, as it is all over now, and as we offered to our brethren before the trial began to pay the costs if they would dismiss the suit, I do not see any objection to consenting to a verdict of one cent, which will carry the costs. There is no occasion to move to exclude that evidence of loss of profits?

The COURT: No. The motion has been made, but I have not passed on it.

Mr. HOEHLING: Except now.

Mr. GOSNELL: May it please the Court, the other side do not want to appear to consent to a verdict, but they are willing, and we are also willing, that your Honor shall say to the jury now that if they find a breach by the defendant, that the verdict cannot exceed nominal damages, and if they find no breach, then the verdict shall be for the defendant.

The COURT: If I do that, you will not except to the Court's interpretation of the law to the jury?

181 Mr. GOSNELL: We will not.

Mr. JACKSON: We want to reserve the exception. We will ask your Honor to allow us to reserve an exception to the ruling.

The COURT: Very well. Gentlemen, just go out and consider this question, that is, whether you think the defendant is guilty of a breach of contract in this case. If you think it was, then bring in a verdict for one cent. If you think it was not, bring in a verdict generally for the defendant.

And, thereupon, counsel for plaintiff, while waiving the informality of the language in which the foregoing instruction is couched, reserved an exception to the ruling of the court on the question of the measure of damages.

(The jury thereupon retired to consider of their verdict.)

And the plaintiff prays the Chief Justice presiding at the trial to sign and seal this bill of exceptions, which is accordingly done *nunc pro tunc* this 8″ day of October, A. D. 1909.

HARRY M. CLABAUGH, [SEAL.]
Chief Justice.

O. K.

A. A. HOEHLING, JR.,
Att'y for Def't.

10/8/09.

182 *Directions to Clerk for Preparation of Transcript of Record.*

Filed October 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49960.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, Bankrupt,
vs.
WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY.

John R. Young, Esq., Clerk:

Please include in the Transcript of Record for the Court of Appeals in the above entitled cause, the following pleadings and papers:

1. Plaintiff's declaration.
2. Pleas of defendant.
3. Plaintiff's joinder of issue.
4. Memorandum of verdict for plaintiff.
5. Judgment.
6. Appeal order.
7. Citation.
8. Memorandum of appeal bond.
8½. " " order extending time.
9. Bill of Exceptions and order thereon.

E. BEVERLY SLATER,
E. HILTON JACKSON,
Attorneys for Plaintiff.

183 & 184 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 182, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49960 at Law, wherein E. Hilton Jackson, Trustee of the Estate of Henry N. Girard, a Bankrupt, is Plaintiff and Washington, Baltimore and Annapolis Electric Railway Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 28th day of October, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

185 Court of Appeals of the District of Columbia.

October Term, 1909.

No. 2082.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, a Bankrupt, Appellant,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellee.

Appeal from the Supreme Court of the District of Columbia.

The Clerk in printing the transcript of record in the above entitled cause will omit pages 143 and 144, the same being Schedule A-1 and Schedule A-1 No. 2, it being agreed that the Schedules show the item of taxes for 1906, on property located near Widewater, Virginia, unpaid, and unpaid wages to various employees, ten in number, from about July 25 to August 28, 1906, all amounting to $586.48.

Omit all of pages 150, 151, 153, 154, 156, 157 and 158.

E. BEVERLY SLATER,
Attorney for Appellant.
A. A. HOEHLING, JR.,
Attorney for Appellee.

(Endorsed:) No. 2082. E. Hilton Jackson, Trustee of the Estate of Henry N. Girard, a Bankrupt, Appellant, vs. Washington, Baltimore and Annapolis Electric Railway Company, a Corporation, Appellee. Stipulation as to Printing Record. Court of Appeals, District of Columbia. Filed Jan. 25, 1910. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2082. E. Hilton Jackson, trustee, &c., appellant, vs. Washington, Baltimore and Annapolis Electric Railway Company, a corporation. Court of Appeals, District of Columbia. Filed Oct. 28, 1909. Henry W. Hodges, Clerk.

Henry W. Hoover
Clerk

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2082.

E. HILTON JACKSON, TRUSTEE OF THE ESTATE OF HENRI N. GIRARD, A BANKRUPT, APPELLANT,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLANT.

E. BEVERLY SLATER,
Counsel for Appellant.

E. HILTON JACKSON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2082.

E. HILTON JACKSON, TRUSTEE OF THE ESTATE OF HENRY N. GIRARD, A BANKRUPT, APPELLANT,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLANT.

This is an appeal from the decision of the Supreme Court of the District of Columbia, holding the rule of damages applicable in this case to be the difference between the contract price and the market value of the undelivered ties.

Statement of Facts.

The facts of this case, so far as a comprehensive consideration of the question presented by this appeal requires them to be stated, are briefly as follows:

On the 16th day of June, 1906, Henry N. Girard and the Washington, Baltimore and Annapolis Electric Railway

Company (hereinafter called the Company) entered into a contract (which is copied *in extenso* in the second count of the declaration (Record, pp. 5, 6), by the terms of which Girard agreed to sell and deliver to the Company 75,000 cross-ties and approximately 50,000 feet, board measure, of switch-ties. After Girard had delivered 28,430 cross-ties and 13,212 feet, board measure, of the switch-ties, and after he had ceased delivering any more at the request of the Company, the Company committed a breach of the contract (verdict of the jury, Record, p. 13, marginal page 24) by refusing to accept any more ties. Girard subsequently went into bankruptcy without having actually gotten but a few of the undelivered ties on hand ready for delivery, and the appellant, his trustee in bankruptcy, brought this action against the appellee for its breach, and sought to recover as damages the profits which Girard would have made on the undelivered ties, *which he did not have on hand,* had he been allowed to complete his contract. The lower court ruled that the measure of the appellant's damages was the difference between the contract price and the market value of the undelivered ties, and that as they were the same it instructed the jury, if they should find that the appellee committed a breach of the contract, then they must bring in a verdict of one cent damages for the appellant, which they did (verdict of the jury, Record, p. 13, marginal page 24; Ruling of the Court, Record, p. 84, marginal page 181).

Exceptions.

There are only two exceptions noted in the entire record, and those were taken by the appellant—

1. To the court's interpretation of the law to the jury, and

2. To the court's instruction to the jury upon the question of the measure of damages (Record, pp. 80, 81, 82, 83, 84).

The appellee reserved no exceptions whatever, and suggested to the court the instruction which it gave (Record, p. 84, marginal page 181).

The appellant prosecutes this appeal, and respectfully submits for the consideration of this honorable court the following:

Assignment of Errors.

1. The court erred in its interpretation of the law to the jury, in that it told them that the appellant's measure of damages was the difference between the contract price and the market value of the undelivered ties.

2. The court erred in instructing the jury that if they should find that the appellee committed a breach of the contract, then they must bring in a verdict of one cent damages for the appellant.

Proposition of Law.

As to those ties which Girard *did not have on hand* at the time of the breach, the court should have applied the rule of damages applicable in cases where, in executory contracts for the sale and delivery of personal property, the *buyer commits a breach* of the contract *before the seller has gotten the things contracted to be sold and delivered actually on hand ready for delivery;* and, under this rule the appellant's measure of damages, as to the undelivered ties which Girard *did not have on hand* at the time of the breach, was the *profits which Girard would have made on such ties* had he been allowed to complete his contract.

ARGUMENT.

Nature of Girard's Contract.

Girard's contract was an executory contract for the sale and delivery of a specified number of ties of a certain standard, and could have been performed by him as well by manufacturing and delivering them from his own mill as by purchasing them from other parties and delivering them, provided they came up to the requirements of the contract.

River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 466, 471, from which an appeal to the Circuit Court of Appeals was dismissed *per curiam* (1009).

See—

169 Fed. Rep., 1022.

Rule of Damages Applicable in the Case at Bar.

It is a fact, established by the verdict of the jury, that the appellee (*the buyer*) committed a breach of the contract in the case at bar, and the evidence shows beyond dispute that at the time of its breach there were nearly 35,000 cross-ties and 36,788 feet, board measure, of switch-ties which Girard (*the seller*) did *not have on hand.* Under these facts, it is respectfully submitted, the appellant's measure of damages was the *profits which Girard would have made by the completion of his contract,* to be figured by deducting from the contract price the amount which it would have cost him to acquire and deliver the undelivered ties.

River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 466, 472, citing in support of this rule—

United States *v.* Behan, 110 U. S., 338, 344, 345, 346.

Kingman *v.* Western Mfg. Co., 92 Fed. Rep., 486.

Horst *v.* Roehm (C. C.), 84 Fed. Rep., 565.
Roehm *v.* Horst, 91 Fed. Rep., 345; 33 C. C. A., 550.
Roehm *v.* Horst, 178 U. S., 1 (44 L. Ed., 953).
Kohn *v.* Dravis, 94 Fed. Rep., 288; 36 C. C. A., 253.

See also—

Hadley-Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. Rep., 243, citing some of the above, and many other authorities.

Rule the Same Whether the Seller Had to Manufacture or Otherwise Acquire the Articles Sold.

And this rule of damages should have been applied by the learned trial judge whether Girard had to manufacture or buy or otherwise acquire the ties which he had contracted to sell and deliver.

River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 466, citing in support of this proposition:
Roehm *v.* Horst, 178 U. S., 1 (44 L. Ed., 953).

See also—

Tiffany on Sales, pp. 232, 233, citing:
Cort *v.* Ambergate, &c., Co., 17 Q. B., 127 (the leading English case).
Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264.
Black River Lumber Co. *v.* Warner, 93 Mo., 374.
Butler *v.* Butler, 77 N. Y., 472, and other cases.

See also—

Danforth *v.* Walker, 37 Vt., 239; *Idem.,* 40 Vt., 260, where the contract was for the sale and delivery of potatoes.

Girard Was Excused from Manufacturing or Otherwise Acquiring the Undelivered Ties.

The action of the appellee in writing Girard to suspend the shipment of ties, and finally refusing to accept any more, excused him from manufacturing or otherwise acquiring the undelivered ties.

Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264; 30 L. Ed., 967, 970, where the time in which to perform the contract had expired.

Payne *v.* Pomeroy, 21 App. D. C., 243.

3 Paige on Contracts, p. 2220, secs. 1436, 1442.

Lake Shore & M. S. R. Co. *v.* Richards, 30 L. R. A., 48.

Barnes *v.* Morrison, 97 Va., 372.

Textor *v.* Hutchins, 62 Md., 150.

Effect of the Rule of Damages Contended for by the Appellee.

To apply the rule of damages contended for by the appellee in the case at bar—that the appellant's measure of damages is the difference between the contract price and the market value of the undelivered ties—is equivalent to saying that Girard, after ceasing the shipments of ties to *suit the convenience of the appellee*, and after the appellee subsequently *refused to accept any more ties*, must still go on and manufacture, or otherwise acquire, the undelivered ties and sell them for the best price he could get, and then, if he lost anything, the plaintiff's damages should be measured by said loss. This is the *contention* of the appellee here.

Bearing in mind the fact that the rule of damages for the *breach by the buyer* of a contract for the sale and delivery of personal property is the same, whether the *seller* had to *manufacture* or *otherwise acquire* the articles con-

tracted to be sold and delivered, the case of Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264, is almost identical with the one at bar. In that case the Steel Company postponed rolling and drilling the rails to suit the convenience of Hinckley, and thereafter, after the time for the completion of the contract had expired, Hinckley refused to accept the rails altogether. The Steel Company then brought an action for the breach of the contract against Hinckley, in which it recovered, as its measure of damages, the *profits which it would have realized had it been allowed to complete the contract.* Hinckley made the same contention that the appellee is making here, and sought to have the same rule of damages applied. On this proposition the Supreme Court of the United States, in affirming the action of the lower court, said:

> "The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails; and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present. The proposition that after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice" (L. Ed., p. 970).

When Profits Recoverable as Damages.

In 13 Cyc., pages 53 and 54, it is said:

> "If the profits are such as grow out of the contract itself and are the direct and immediate result of its fulfillment they form a proper item of damages."

And this is true, it is respectively submitted, whether the action be brought to recover damages—

1. *By one who has contracted to sell and deliver personal property, where the breach occurs before he has gotten the articles sold actually on hand.*

River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 155, and cases there cited.

Roehm *v.* Horst, 178 U. S., 1 (44 L. Ed., 953).

Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264 (30 L. Ed., 967).

Danforth *v.* Walker, 37 Vt., 239; *Idem,* 40 Vt., 260.

2. *Or by one who has contracted to furnish work and labor.*

United States *v.* Behan, 110 U. S., 338.

P. W. & B. R. R. Co. *v.* Howard, 54 U. S., 13 How., 307.

3. *Or by one who has contracted to perform services.*

United States *v.* Speed, 8 Wall. (U. S.), 77.

When Profits Not Recoverable as Damages.

The following language from P. W. & B. R. R. Co. *v.* Howard, *supra,* is quoted with approval in Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264 (30 L. Ed., at page 970):

> "Wherever profits are spoken of as not a subject of damages, it will be found that something upon future bargains or speculations, or states of the mar-

> ket, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost."

It is too plain to require argument, that the difference between the contract price and the cost of getting and delivering the ties (or, in other words, the profits) was the inducement and consideration which caused Girard to enter into the contract; that this profit was within the contemplation of the parties at the time the contract was entered into; and that the loss of this profit, to the extent of the undelivered ties which Girard *did not have on hand,* was the natural result of the appellee's breach of the contract. And if this be true, it is doubtful if a single authority can be found in support of the application of a rule of damages in this case which would exclude its recovery.

See—

Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S., 264 (30 L. Ed., top of page 970).

No Element of Doubt as to Girard's Loss.

There is no element of doubt or speculation as to the loss of $7,740.28 which Girard sustained in the shape of profits on the undelivered cross-ties (Evidence of Girard, Record, pp. 16, 17, 18). As to this amount the evidence is *uncontradicted.* Girard had contracted with various persons to supply him with cross-ties at a definite price with which to complete his contract with the appellee. The freight rate on these ties was definitely ascertained, and therefore this rate added to what Girard was to pay for the ties constituted their total cost to him. The difference between this cost and the contract price was Girard's profits, and what, it is respectfully submitted, the plaintiff, as his trustee in bankruptcy, should have been allowed to recover as the measure of damages in this case.

Appellee Bought Ties for Less than Girard's Contract Price.

It cannot be denied by the appellee that, instead of allowing Girard to go on and complete his contract, it purchased the balance of the ties which it needed—about 45,000 or 50,000—at a less price than Girard's contract called for. Girard was to get fifty-five and *fifty-nine* cents per tie, according as the freight rate should be over or under eight cents per hundred pounds, whereas the appellee purchased all the above-mentioned ties at *fifty-five cents per tie irrespective of the freight rate* (Record, p. 37; marginal page 71). To apply the rule of damages contended for by the appellee in this case would seem, therefore, to be not only contrary to the authorities, but would enable the appellee to profit by its own wrong in violation of the long-established maxim in the law—"*Nullus commodum capere potest de injuria sua propria.*"

Review of the Case Relied Upon by the Appellee in the Lower Court.

In the court below the appellee relied upon the case of the Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. Rep., 444, as laying down the proper rule of damages in the case at bar; and the learned trial judge applied the rule there stated in the present case.

If it should be conceded that that case is not distinguishable from the one at bar, then it is respectfully submitted that the rule of damages there announced is *contrary to the overwhelming weight of authorities,* both before and since its decision. It is not conceded, however, that the learned judge who decided that case meant to lay down a rule of damages different from that contended for by the appellant in a case like the one at bar. In the report of that case the

contract between the parties is given *in extenso,* and by its very terms Chapman (*the seller*) agreed to sell and deliver

> "fifty million feet of the timber that he owns, or had in anyway control of, being a portion of 42,000 trees bought in the style of Albert Pack, trustee, and also 32,000 trees that are owned and controlled by S. F. Chapman as an individual, both on the Russell and Levisa forks of the Sandy River."

It will be observed that the seller in that case *already owned, or was in control of,* every foot of the lumber which he contracted to sell and deliver, and it is more than likely, in view of the language above quoted from the contract, that the *pleadings* (which are neither given nor quoted from in the report of the case) *were so drawn* as to eliminate any doubt that the seller *owned and was in the possession of* all the lumber he had contracted to sell. The learned judge who wrote the opinion of the court in that case based the application of the rule of damages there stated upon the manner in which the case was *presented by the pleadings,* and without an examination of the pleadings in that case it is respectfully submitted that the opinion of the court therein cannot be taken as an authority in support of the appellee's contention here. In that case the court said:

> "We have no hesitancy, on the pleadings as they now stand, in announcing the true measure of damages in this case—if damages there were—as the difference between the contract price of the timber and its market value at the places where it was to have been delivered," etc. (page 456).

Rule of Damages Different in Suits by the Buyer.

The rule of damages contended for by the appellee would be—

> "a just rule for the buyer in a suit by him, because on the breach, having the money in hand, he may procure the goods on the market, and charge the seller with the difference."
>
> River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 466, 473.

Recent and Well-considered Cases.

The case of Kingman & Co. *v.* Western Mfg. Co., 92 Fed. Rep., 490, and the case of River Spinning Co. *v.* Atlantic Mills, 155 Fed. Rep., 463, are two of the latest and best considered cases involving directly the question presented by this appeal. The latter case is believed to be the latest expression by any court on the subject. The opinions of the courts in these two cases are so thorough in their review of the authorities, and in support of the rule of damages contended for by the appellant in the present case, that the indulgence of this honorable court is respectfully asked to a more elaborate presentation of them here than is usual in briefs.

Kingman & Co. v. Western Mfg. Co., 92 Fed. Rep., 486:

In this case the action was for a breach of a contract to order and purchase certain agricultural implements. The manufacturing company was engaged in the manufacture and sale of agricultural implements in Nebraska, and Kingman & Co. were engaged in the purchase and sale of such implements in several other States. After the manufacture and delivery of a portion of the implements Kingman & Co. committed a breach of the contract by refusing to accept any more. In delivering the opinion in that case the court said:

> "The defendant in error brought this action for a breach of this contract, and alleged that it made and tendered all these articles to the plaintiff in error, but that Kingman & Co. refused to order, accept, or pay for any of them except 54 mowers and 400 cornshellers, and it sought to recover as damages the difference between the market value and the contract price of 103 mowers, 1,400 cornshellers, and 1,200 end gates. The evidence, however, failed to show that at the time of the breach of the contract, which

the witnesses for the defendant in error fixed on November 22, 1893, the defendant in error had made or tendered, or had on hand to tender, any of these implements except the 106 mowers, while the fact was established that it had no end gates and no finished cornshellers, and only about 800 cornshellers in process of manufacture at that time. In other words, on November 22, 1893, when Kingman & Co. refused to order or receive any more implements under this contract, the manufacturing company did not have in its possession or control, and could not and did not tender, the 1,200 end gates nor 600 of the cornshellers required by the contract. The court below, over the objection of the plaintiff in error, gave to the jury the rule for the measure of the damages of the defendant in error which would have been applicable if it had proved the manufacture and tender of all the goods. It charged them that, if they found for the defendant in error, it was entitled to recover the difference between the contract price and the market value of all the articles covered by the contract, whether they had been manufactured or not at the time of the breach. The principal question in the case is whether this was the true rule for the measure of the manufacturer's damages which resulted from the failure of the purchaser to order and take the 600 cornshellers and the 1,200 end gates which it had not made, or commenced to make, when the purchaser refused to order or take any more implements under the contract.

"Compensation is the true measure of damages. The injured party may recover what he loses by the breach of his contract, but he cannot recover more, and his recovery must always be limited to the losses which he necessarily suffered from the breach. After he has received notice that the defaulting party will not perform the contract, he may not unnecessarily incur further liabilities or expenses in its performance, and then charge the increased loss he thus incurs to the defaulter. When, on November 22, 1893, the defendant in error received notice from Kingman & Co. that the latter would accept no more implements under the contract, the manufacturing company was bound to refrain from adding to its own

loss and to that of the plaintiff in error by making the implements it had not commenced to make; and, if it did so, it cannot be permitted to recover the increased loss it thus voluntarily incurred. Danforth *v.* Walker, 37 Vt., 239, 244. When the manufacturing company received this notice there were 600 cornshellers and 1,200 end gates which it had not commenced to make, and which it never did in fact manufacture. Was it entitled to recover the difference between the market value and the contract price of these implements? The general and just rule for measuring the damages for a breach of a contract for the sale of personal property is the difference between its market value and its contract price, because the vendor is presumed to have the property on hand; and his profits if the contract is performed, and his loss if it is broken, is the exact difference between the price he can sell the property for in the market and the price he is entitled to receive for it under the contract. This was the true measure of the loss of the defendant in error on the 106 mowers which it had made and was ready to deliver when the contract was broken, because it had them on hand, and it was entitled to their contract price; while after the breach it could obtain only their market value, so that it necessarily lost the difference. But the difference between the market value and the contract price in no way measured the loss the manufacturing company sustained on the 600 shellers and the 1,200 end gates which it never made or had. It could not sell these at the market price, for it did not have them. What it did have under the contract, at the time of this breach, was the right to manufacture and deliver these articles. and to receive the contract price for them. When the breach was made, it was deprived of this right, and its loss was necessarily the difference between the expense it would have incurred in manufacturing and delivering them and the contract price it would have received; or, in other words, the profit it would have made upon them if it had performed the contract."

At page 489 the court elucidates its opinion by stating an illustration, and says:

> "The distinction we have pointed out exists in the authorities as well as in reason."

It then goes on to review the authorities, and concludes its opinion by stating five rules for determining the correct measure of damages in actions for breaches of contracts for the sale and delivery of personal property.

> *River Spinning Co. v. Atlantic Mills,* 155 *Fed. Rep.,* 466, *from which an appeal was dismissed per curiam* (169 *Fed. Rep.,* 1022):

In this case the River Spinning Co. contracted to sell and deliver to the Atlantic Mills so many thousand pounds of yarn at a certain price. It was understood and contemplated by both parties that the yarn was to be spun at the plaintiff's mill, but the court said—

> "the terms of the written contract did not impose upon the plaintiff the obligation to spin this yarn, and its obligation would have been fully performed by the tender of yarn of like quality spun at other mills."

After the River Spinning Co. had spun and delivered a portion of the yarn, the Atlantic Mills committed a breach of the contract by refusing to accept any more of the yarn. At this time the River Spinning Co. had on hand 33,198 pounds of the yarn which it had spun under the contract, and a large quantity of wool, the price of which had fallen considerably since it had been purchased. The River Spinning Co. brought suit against the Atlantic Mills for its breach of the contract, and sought to recover—

> "(1) The contract price of 33,198 pounds of yarn which it had manufactured and had on hand."

As to this item, the court held the measure of damages to be the difference between the contract price and the market value of the yarn, and that as no evidence had been introduced as to its market value, but simply that it was a staple article, for which there was a "regular market," the plaintiff could recover only nominal damages (page 472).

> (2) The "difference between the contract price and the market price at the time of the breach" for its failure to take 182,176 pounds of yarn "which the plaintiff did not manufacture" (page 472).

By consent of the parties this case was tried by the court, without a jury, and as to this second item it said:

> "I find the plaintiff entitled to recover as damages: The profit which it would have made by the completion of the contract, to be figured by deducting from the contract price the amount which it would have cost the plaintiff to produce the same at its mills.
>
> "The proper rule of damages in this case I find to be that stated in United States *v.* Behan, 110 U. S., 338, 344, 345, 346; 4 Sup. Ct., 81, 83 (28 L. Ed., 168):
>
> " 'The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract' " (page 472).

At page 473 the court said:

> "The defendant contends that this rule of damages is inapplicable to the present case, for the reason that the contract was an executory agreement for the sale and future delivery of a staple article of commerce, and that the measure of damages for such an agree-

ment is the difference between the contract price and the market price at the time of the breach.

"While this is a just rule to determine a loss of profit on goods ready for delivery at the time of the breach, as was pointed out in Kingman *v.* Western Mfg. Co.,, 92 Fed. Rep., 486, 490; 34 C. C. A., 489; it is not the true rule as to goods not then made and ready for delivery. It is a just rule for the buyer in a suit by him, because on the breach, having the money in hand, he may procure the goods on the market, and charge the seller with the difference. But to measure the damages of a seller who has not the goods on hand by the difference between the contract price and the market price is often impractical, and would often be unjust. It would be equally unjust in a case where the seller was to make the goods himself, and in a case where he was to procure the goods from other manufacturers or jobbers. If the vendor can make his goods for less than the market price, he is entitled to his actual profit. If his goods are to be bought, or to be made for him by other contractors above the market price, then his profit would be smaller than the difference between the contract price and the market price. Only if the cost of production and the market price at the breach were the same would the rule be just, and this is practically to say that the rule would seldom be a just mode of determining the loss of profits.

"That there is in a suit by the seller no proper basis for a distinction between goods which he is to manufacture (whether bound to manufacture or not), and goods which he is to buy, instead of to manufacture, is apparent from the reasoning of the Supreme Court in Roehm *v.* Horst, 178 U. S., 1, 21; 20 Sup. Ct., 780, 788 (44 L. Ed., 953); where it is said:

"'If the vendor has to buy instead of to manufacture, the same principle prevails,' etc.

"In figuring what profit the seller has lost, he should be charged with the expenditures which he would have been to for getting the goods in hand for delivery to the buyer, whether he was to make them himself (voluntarily, or under obligation to do so), have them made by other manufacturers, or was to buy them ready made. It is enough to show what

would have been the seller's cost of acquiring the goods. The mode of acquisition is irrelevant to the rule that, in order to compensate the seller, the buyer who has chosen to break a contract should pay the seller the profit he would otherwise have made. From the decisions of the Supreme Court above cited, it appears that the principles of compensation are not peculiar to cases where the seller agrees to manufacture, as well as to sell. Furthermore, the seller relies upon obtaining the contract price because it includes his reimbursement as well as his profit. If he has the goods, he can reimburse himself by selling them. He cannot reimburse himself by selling what has never come into existence or into his hands; and the fact that he is justly excused from making or getting the goods leaves him with no recourse but the buyer for reimbursement for expenses and for compensation for loss of profit. The rule for which the defendant contends not only fails to give compensation to the seller for his actual loss of profit, but fails absolutely to recognize the duty of the buyer to reimburse the seller for expenditures.

"I am of the opinion that the plaintiff is entitled to recover as its loss of profit the sum of $13,717.19, being 7½ cents per pound upon 182,768½ pounds of yarn not manufactured" (page 474).

It is respectfully submitted that the application of the rule of damages contended for by the appellant in the case at bar is amply sustained by the foregoing authorities, without further elaboration or discussion thereof.

Harmless Error.

It is respectfully submitted that the appellee cannot sustain the contention that the court below committed harmless error in instructing the jury, in case they found the appellee had committed a breach of the contract, to bring in a verdict of one cent damages for the appellant.

1. It cannot be maintained that the appellant failed to prove damages, because the *uncontradicted* evidence shows

that Girard sustained a loss of profits on the undelivered cross-ties amounting to the sum of $7,740.28 (Record, pp. 16, 19).

2. It cannot be argued in this honorable court that the evidence was not sufficient to go to the jury on the question of the breach of the contract by the appellee, because the appellee not only agreed, but, as a matter of fact, suggested to the lower court the instruction which it gave submitting the question of the breach to the jury (Record, p. 84, marginal page 180).

Rule No. 5, section 3, page 16, of the Revised Rules for the Government and Practice of the Court of Appeals, provides that—

> "3. In no case will this court decide any point or question that was not fairly presented for decision by the court below; nor shall any question arise in this court as to the insufficiency of evidence to support any instruction actually given, unless it appear that such question of the insufficiency of evidence was distinctly made to and decided by the court below."

The case of Capital Traction Co. *v.* Brown, 29 App. D. C., 473, is directly in point. In that case this court held that, where in an action for personal injuries the trial court submits to the jury, through an instruction prayed by defendant, the question of whether plaintiff used due care, it is too late for the defendant to raise the question on appeal.

In the case of Brown *v.* Washington & Georgetown R. R. Co., 11 App. D. C., 37, this court held that the question of the preponderance of evidence will not be considered on appeal, thereby sustaining that special prerogative of the jury which has ever been sacred in the history of our jurisprudence.

But even if the appellee had not suggested to the lower court the instruction which it gave, it did not reserve a single exception to any ruling of the trial court, and in the case of Evans *v.* Schoonmaker, 2 App. D. C., 62, this court

held that errors in the rulings of a trial court cannot be reviewed unless exceptions were reserved at the trial.

3. If the appellee had any reason, prior to the 26th day of October, 1903, for rescinding its contract with Girard, it waived it by its letter of that date (Record, p. 61, marginal page 120) directing him to proceed with the delivery of the ties. This proposition is too well settled almost to require the citation of authorities.

Moran *v.* Wagner, 28 App. D. C., 371.
Shappirio *v.* Goldberg, 20 App. D. C., 185.
Shappirio *v.* Goldberg, 192 U. S., 232.

It is respectfully submitted, therefore, that the only question presented by this appeal for the consideration of this honorable court is as to whether or not the learned trial judge applied the proper rule of damages in this case. It is respectfully insisted on behalf of the appellant that he did not, and that for that reason this case should be remanded for a retrial in conformity with such views as may be expressed by this honorable court.

All of which is respectfully submitted,

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Counsel for Appellant.

E. Hilton Jackson,
Of Counsel.

Henry W Hodges,

Court of Appeals, District of Columbia,

JANUARY TERM, 1910.

No. 2082.

E. HILTON JACKSON, TRUSTEE OF THE ESTATE OF HENRY N. GIRARD, A BANKRUPT, APPELLANT,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLEE.

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WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLEE.

This appeal is from a judgment of the Supreme Court of the District of Columbia in an action for alleged breach of a contract entered into between Henry N. Girard, the bankrupt, and the appellee, for the sale and delivery of certain railway ties. It was ruled that the measure of damages was the difference between the contract price and the market value of the undelivered ties. *Counsel for the appellant conceded that if such was the correct rule, no damage had been sustained,* the learned Court below observing, at pages 82 and 83 of the record:

> "What was the difference between the market price of those ties and the contract price? From the evidence there does not appear to be any, and counsel has very frankly conceded that if the Court should find in this case that the rule of damages is the market value of

> the ties, then there is no damage done, because the market value is shown, by all the evidence, to be about the contract price."

Notwithstanding the above concession and notwithstanding the fact that the appellant's evidence was that all the undelivered ties were on hand ready for delivery at the time of the alleged breach, the position is now taken that Girard did not have the undelivered ties on hand and that there was a difference between the contract price and the market value thereof. This makes it incumbent upon us to give the facts as they appear in the record.

Statement of Facts.

The contract between Girard and the appellee was dated the 16th of June, 1906, and was for the sale and delivery of 75,000 or more cross-ties, and approximately 50,000 feet, board measure, of switch-ties, of the dimensions, at the prices, and for delivery at the times and place, particularly set forth in the contract. Deliveries were to commence at once and shipments were to continue at the rate of 15,000 ties per month, and not less than three sets of switch-ties per month, all shipments to be completed by November 15, 1906 (Record, pages 5, 6).

Girard, in order to finance his contract, in July, 1906, assigned all monies payable to him thereunder to the National City Bank of Washington, and the appellee accordingly made payments from time to time to the Bank (Record, page 46).

Girard having become financially embarrassed, certain of his creditors issued attachments against him out of the Superior Court of Baltimore City and laid the same in the hands of the appellee, as follows: August 1, 1906, W. C. Bates Company, for $2,000; August 24th, Herbert Wingfield, for $903.10; August 31st, John W. Masters, for $1,329; September 10th, Sherwood Stonnell, for $344.88,

making a total of $4,676.98. The appellee appeared and confessed assets subject to the legal operation and effect of the assignment to the bank (Record, pages 41, 42).

About this time Girard had his counsel, Douglas & Douglas, prepare his petition and schedules in bankruptcy. Girard testified that they were prepared in August or September (Record, page 23). As a matter of fact they must have been prepared in September because the claims of many of his creditors were scheduled as of the 31st of August, 1906.

In September, 1906, the above-mentioned attachments were dissolved upon the appearance of Girard and the giving of dissolving bonds, and the money in the hands of the appellee was paid over by agreement to the bank and the Surety Company on the dissolving bonds jointly (Record, pages 53-55).

Notwithstanding the financial embarrassment of Girard, the appellee was willing that he should carry out his contract, if possible, and accordingly, on Saturday, the 20th of October, 1906, it was arranged in an interview between Mr. Girard and Mr. Masterton, secretary and treasurer of the appellee, that shipment of ties should be resumed. No shipment, however, was made, whereupon Masterton wrote to Girard on October 26th, referring to the conversation of October 20th, and said: "We have heard nothing from you regarding the matter up to the present time. It is important that there be no further delay, as we must have 15,000 ties immediately. Please advise if you are ready for inspector, as shipments must now be pushed forward," to which Girard replied on the following day, stating that he had the 15,000 ties ready to load, but the cause of delay was inability to place cars, giving as another reason that because of heavy rains the roads were in bad shape (Record, page 61).

On the 30th of October, three days after Girard had written his letter, Douglas & Douglas, his counsel, called up

Marbury & Gosnell, counsel for the appellee in Baltimore, and notified Mr. Gosnell as follows: That he was about to file proceedings in bankruptcy, and made a proposition that the contract between Girard and the company should be cancelled, and after the bankruptcy proceedings of Girard were had, that the matter would be taken up and a new contract made for the delivery of the balance of the ties. Mr. Gosnell promptly replied that he would not be a party to any such arrangement, whereupon Mr. Douglas said he would schedule the contract or whatever rights Girard had under it as one of his assets, to which Mr. Gosnell replied that he was not concerned with the contents of the schedule (letter of November 5th, Marbury & Gosnell to Girard, Record, page 62; stipulation as to Mr. Gosnell's testimony, Record, page 43).

Girard swore to his petition and schedules, October 30, 1906 (the very day Mr. Douglas called up Mr. Gosnell on the 'phone and had the conversation with him as above detailed), but they were not filed until the 5th of November 1906 (Record, pages 71-74). Girard testified that between the date of his letter of October 27th and the filing of his petition and schedules, he had a conversation with Masterton over the 'phone, asking him to send and inspect the 15,000 ties, which he was then ready to deliver, but that Masterton refused to send inspectors because of the bankruptcy proceedings (Record, pp. 18, 19). On the 19th of November, 1906, the day of the first meeting of the creditors of Girard (Record, page 40), he wrote to Masterton as follows (Record, page 64):

> "I have 10 to 15,000 ties that are all ready to load and would like to sell them to you. If you need them I would like to quote you prices of them. They are 6″ to 7″ thick x 6″ face up to 8′ long. If you are in the market for any I would be pleased to hear from you. Could also furuish some white oak switch-ties if you need any. Am now in a position to finance my

own business and can assure you that you would not have any more bother as you did have before, on the business previous. Hoping to hear from you at your convenience."

Girard swore that the above 10,000 or 15,000 ties were the same as those mentioned in his letter of October 27 (Record, page 22).

It appears that the deliveries made by Girard under his contract were about 28,430 cross-ties and 13,212 feet of switch-ties, and he testified (Record, page 17) that he had on hand and ready for delivery to the appellee prior to his bankruptcy proceedings the remaining cross-ties and switch-ties, all of which (including 4,879 at his mill) were located within a radius of 50 miles from Washington. The persons from whom he purchased the same and other particulars being as follows:

Girard's Vendors.	*Date of Contract.*	*Total Ties.*	*Delivered to Appellee and others.*	*Still Available.*
Daniel Lee	Apr. 11, 1906	30,000	4,759	25,241
Thomas Shackelford	May 17, "	8,000	1,525	6,475
R. S. Matthews	June 16, "	5,000	755	4,245
W. V. Moore	" 25, "	10,000	4,270	5,730

Girard further testified that Herbert Wingfield was to furnish him with 50,000 feet board measure of switch-ties, which he was to deliver to the appellee; that he had delivered 13,212 feet, leaving 36,738 feet undelivered (Record, pages 17-18).

Wingfield testified that he shipped two cars of switch-ties on August 4, and on August 23d he filed attachment proceedings in Baltimore, after which Girard never ordered any more ties from him (Record, page 29).

As appears by Schedule A 2, Robert S. Matthews held 3,276 ties as security for a debt of $987 contracted July 30, the security having been given August 16, 1906.

As appears by Schedule A 3, Sheet No. 3, $371.18 was due Thomas Shackelford for 1,100 ties delivered between July 19th and 25th, and Girard owned W. V. Moore $277 on protested check dated August 13, 1906.

Mr. Preston, one of the witnesses, testified, on page 39, that in September or October of 1906, which was subsequent to the attachment proceedings, Girard wanted to assign to him the contract in controversy; that Girard first wanted $2,000, and finally would have taken $1,000 if the appellee would have assented to the assignment. Preston when asked why Girard wanted to assign the contract, said: "Perhaps because he was not in a position to fill it. At that time he had not been adjudged a bankrupt and he did not want to make shipments in his own name to allow his creditors to attach the proceeds from these ties to be in the company's hands, if he shipped ties himself."

The schedules of Girard showed that he owed everybody for ties, some of which, according to the record, were delivered to the appellee.

In Schedules A 2 and B 3 all rights of Girard under the contract in controversy appear as assigned to National City Bank of Washington.

The only evidence in the record as to values is to the effect that there was no difference between the contract price and the market value of the undelivered ties at the time and place of delivery. The record does not state that it contains all the evidence adduced at the trial, but in view of the testimony of Girard and that portion of the opinion of Mr. Chief Justice Clabaugh, above quoted, the following facts must conclusively be presumed: (*a*) That Girard had on hand, ready to be delivered to the appellee at the time of the alleged breach of contract, all undelivered cross-ties and switch-ties; and (*b*) that there was no difference between the contract price of those undelivered and the market value of the same at the time and place of delivery.

ARGUMENT.

The following rules are fully sustained by the authorities :

I.

1. THE MEASURE OF DAMAGES FOR A BREACH OF A CONTRACT TO PURCHASE PERSONAL PROPERTY IS THE DIFFERENCE BETWEEN THE MARKET VALUE AND THE CONTRACT PRICE OF THE PROPERTY AT THE TIME OF THE BREACH, IF THE LATTER BE GREATER THAN THE FORMER.

2. THE SAME RULE IS APPLICABLE TO THE MEASURE OF DAMAGES RESULTING FROM THE FAILURE TO ACCEPT ARTICLES WHICH HAVE BEEN MADE AND ARE READY FOR DELIVERY AT THE TIME OF THE BREACH BY THE PURCHASER UNDER A CONTRACT TO PURCHASE GOODS OF A MANUFACTURER.

3. WHERE THE CONTRACT IS TO PURCHASE GOODS OF A MANUFACTURER AND THE GOODS SO CONTRACTED FOR ARE NOT MADE AND READY FOR DELIVERY AT THE TIME OF THE BREACH, THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE AMOUNT IT WOULD COST THE MANUFACTURER TO MAKE AND DELIVER THE GOODS AND THEIR CONTRACT PRICE, THAT IS TO SAY, THE MANUFACTURER'S PROFIT.

4. WHERE THE CONTRACT IS FOR THE SALE OF GOODS, AND DELIVERIES ARE TO EXTEND OVER A PERIOD OF FOUR OR FIVE YEARS, AND THE VENDEE GIVES NOTICE OF HIS INTENTION NOT TO COMPLY WITH THE OBLIGATION OF HIS CONTRACT, THE VENDOR MAY ACCEPT THIS AS AN ANTICIPATORY BREACH, AND SUE FOR DAMAGES *before the time for performance arrives*, AND IN SUCH ACTION THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE PRICE AT WHICH THE VENDOR COULD HAVE MADE SUB-CONTRACTS FOR THE DELIVERY OF THE GOODS ACCORDING TO HIS AGREEEENT WITH THE VENDEE.

5. WHERE A PARTY IS ENTITLED TO THE BENEFIT OF A CONTRACT AND CAN SAVE HIMSELF FROM A LOSS ARISING FROM THE BREACH OF IT AT A TRIFLING EXPENSE, OR WITH REASON-

ABLE EXERTIONS, IT IS HIS DUTY TO DO IT, AND HE CAN CHARGE THE DELINQUENT WITH SUCH DAMAGES ONLY AS WITH REASONABLE ENDEAVORS AND EXPENSE HE COULD NOT PREVENT.

Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. Rep. 444, 454-456.
Kingman vs. Western Mfg. Co., 92 Fed. Rep. 486, 490.
Hinckley vs. Pittsburgh Co., 121 U. S. 264.
Horst vs. Roehm, 84 Fed. Rep. 565.
Roehm vs. Horst, 91 Fed. Rep. 345.
Roehm vs. Horst, 178 U. S. 1, 21.

It is perfectly obvious that the correct rule was adopted in this case. The contract was clearly for a sale and delivery of the ties and not for their manufacture. Had the contract been for the manufacture and delivery of ties, still the rule was correctly applied, because all the ties were in existence and ready for delivery at the time of the alleged breach. This is shown by the evidence of Girard himself, who, on page 17 of the record, testified that "ALL OF THE ABOVE TIES WERE LOCATED WITHIN A RADIUS OF FIFTY MILES OF WASHINGTON, D. C."

In this connection reference is again made to the letter of Girard of October 27, 1906, where he says he was in a position to deliver 15,000 of the ties (Record, page 61), and his letter of November 19, 1906, where he had from 10,000 to 15,000 ties ready to load (Record, page 64), and which ties he testified were the same as those referred to in his letter of October 27th (Record, page 22). That the ties were in existence and that Girard was in a position to deliver them is also shown by the opinion of Mr. Chief Justice Clabaugh (Record, pages 82, 83).

The theory of the plaintiff's case at the trial was that Girard had the ties on hand ready for delivery, but the learned counsel misapprehended the rule for the measure of

damages applicable to the facts of the case. Claim was there made, as it is now made, that the plaintiff was entitled to profits, and the contention is now made that the undelivered ties were not on hand and ready for delivery ; consequently lost profits is the measure of damages.

If Girard sustained a loss, which we, of course, deny, it was through his own fault, because if he had the ties on hand, as he says he did, it was his duty to sell them. There was a ready market for the ties, and it is indisputable, in fact conceded, that the market value at the time and place of delivery was the same as the contract price.

It would serve no useful purpose to review all the authorities relied on by the appellant, as none of them are applicable to the facts of the case at bar, but brief reference may be made to one or two of them.

In Kingman vs. Western Mfg. Co. (*supra*), the Court recognized the general rule for the measure of damages upon a breach of contract for the sale of personal property, but held that it was wrongly applied in that case, which was an action *for the refusal to take from the manufacturer articles that had never been made under the contract.* So in River Spinning Co. vs. Atlantic Mills, 155 Fed. Rep. 466, the Court recognized the rule contended for by the appellee as to goods on hand and ready for delivery, but *as to articles not manufacturerd* it was held the vendor was entitled to profits.

Probably the most analagous case to the one now under consideration is Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. Rep. **444**, heard before Goff and Simonton, Circuit Judges, and Brawley, District Judge. There the action was for failure to receive timber under a contract for a sale and delivery at certain points. The rule contended for by the vendor was for loss of profits, claim being made that the contract was to furnish materials and to do work and that the measure of damages was the difference between the con-

tract price and the cost of preparing the timber for delivery, with an allowance for lost time. The Court, however, held the proper measure of damages to be the difference between the contract price of the timber and its market value at the place where it was to have been delivered, or, if the defendant had entire control of the market there, at the nearest available market, less the additional cost of delivery at such market.

In a well-considered opinion delivered by Judge Goff it was said, at pages 454-456 :

> "The Court erred when it gave this instruction. It is not the law applicable to the contract and facts submitted to the jury. We will dispose of the matter by saying that if the defendant was liable in damages to the plaintff for breaches of the contract mentioned, the measure of the same should have been found by the rule having relevancy to the violation of a contract for the sale and delivery of personal property. In the instruction to the jury that rule was confused with the one resorted to for the purpose of ascertaining the damages following the breach of a contract to furnish the materials and do work.
>
> "We have fully considered the cases cited by counsel for defendant in error, and especially Masterton vs. Mayor, etc., 7 Hill, 61 ; U. S. vs. Speed, 8 Wall. 77 ; Railroad Co. vs. Howard, 13 How. 307 ; U. S. vs. Behan, 110 U. S. 338, 4 Sup. Ct. 81. The rule laid down in said cases, that upon the breach of an executory contract for work, labor and materials, the injured party has an immediate right of action, and may recover full damages upon the whole contract, without waiting for the lapse of the full time required for the entire performance, and without tendering further performance on his part from time to time, is not questioned, nor is it germane to the case we now consider. In the Masterton Case, which is a leading one in this branch of the law, especially upon the subject of the profits that may be allowed as damages, the plaintiff contracted with defendant to furnish, cut, fit and deliver marble, dressed in a certain manner, to be used in the construc-

tion of a building; the defendant agreeing to pay in installments. The suit involved an investigation concerning the cost to which the contractor might have been subjected had the contract been carried out, including the procuring of rough material, dressing the same, etc. Part of the marble was duly delivered and paid for, and then the defendant refused to receive and pay for any more; that being the breach complained of. Under such circumstances, the rule for ascertaining damages, embraced in the instruction given in this case, was applicable. There the marble furnished and cut under the contract had no special value for any other purpose,—in other words, there was no market for it,—and the contractor was, as to it, entitled to his contract price, and as to that not delivered he was entitled to such profit, if any, as was the difference between the contract price and the cost of procuring and preparing it ready for use. That case lacked entirely the element of market value. The other three cases named were suits on contracts for work and labor to be performed and materials to be furnished for the same. In all of them the Supreme Court said, in substance, that the measure of damages, under such circumstances, was the difference between the cost of doing the work and what the contracting party was to receive for it. In these cases—contracts for labor and special work—the plaintiffs were, in case of a breach of the same, entirely helpless, for their time had been occupied, their means expended, and they had neither product nor a market in which to sell it, by means of which they could have obtained the compensation they were entitled to under their respective agreements. They are entirely dissimilar to the case now under consideration, which *ex necessitate rei*, requires a different rule, and the reasons for the same are so clearly stated in the opinions of the Court referred to that it is not apparent to us why they are cited and so earnestly relied on by counsel for defendant in error. If a plaintiff has made the article contracted for according to a certain measure, or by a particular pattern, then the weight of authority and the best reason concur that, when such an article has been completed and tendered, such plaintiff would, in case of

refusal to accept, be entitled to recover the contract price. The reason is obvious, for in such a case there would be no certain market value for such an article; and the maker, having done all that he was required to do by the contract, should have its full weight. The contract in this cause was for the sale and delivery of personal property,—50,000,000 feet of timber,—and the plaintiff claimed that the defendant was guilty of breaches of said contract, in failing to comply with the stipulations thereof, and in refusing to receive said timber. If the plaintiff was entitled to recover, evidently the damages due him should not have been ascertained by the rule set forth in the instruction so given. We have no hesitancy, on the pleadings as they now stand, in announcing the true measure of damages in this case—if damages there were—as the difference between the contract price of the timber and its market value at the places where it was to have been delivered; and if the defendant below had entire control of the market at those places, as is claimed by defendant in error, then the measure of damages was the difference between the contract price of the timber at such points and the price of like timber in the nearest available market, less the additional cost of delivering such timber from said points to such nearest market. McNaughter vs. Cassally, 4 McLean, 530; Fed. Cas. No. 8,911; Pope vs. Filley, 9 Fed. 65; Tower Co. vs. Phillips, 23 Wall. 471.

"It was the spirit of this rule, and the reasons given by the courts for establishing it, that prompted the announcement of another now well-established principle in cases like this—that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. Wicker vs. Hoppock, 6 Wall. 94; Miller vs. Mariner's Church, 7 Me. 51; Russell vs. Butterfield, 21 Wend. 300; U. S. vs. Burnham, 1 Mason, 57, Fed. Cas., No. 14,690; Taylor vs. Read, 4 Paige, 561; Warren vs. Stoddart, 105 U. S. 224. And, also, if the plaintiff has sustained no damage by the

breach of the contract of the defendant, he has no right of action; and unless it appears that property prepared for delivery under the contract could not be sold to other parties for prices as remunerative as the contract called for, plaintiff cannot recover. Barnard vs. Conger, 6 McLean, 497, Fed. Cas., No. 1,001; Parish vs. U. S., 8 Wall. 489."

II.

With all due deference, this case should never have been submitted to the jury, as, where it is clear to a trial Court that, as a matter of law, no recovery can be had by the plaintiff upon any view which can properly be taken of the facts the evidence tends to establish, a verdict should be directed for the defendant.

Chapman vs. Yellow Poplar Lumber Co. (2d appeal), 89 Fed. Rep. 903, *905*.

Mr. Justice Clabaugh, in ruling on the appellee's motion to direct a verdict, very forcibly expressed his views upon the evidence as to the alleged breach, and strongly intimated that the verdict of the jury should be for the defendant.

A casual reading of the record (page 84) will show that probably counsel for the appellee were responsible for the verdict which was rendered in the case, but the fact that there was no evidence of loss suffered by the appellee by reason of the alleged breach; the fact that Girard had the undelivered ties on hand and the time for delivery thereof had expired before the action was brought; and the further fact that the damages, if any, sustained by Girard by reason of the alleged breach had been assigned by him to the National City Bank of Washington, as is shown by the schedules in bankruptcy, A2 and B3, disentitled the appellant to a verdict.

CONCLUSION.

In any aspect of the case, whether the contract was for the sale and delivery of ties, or whether it was for the man-

ufacture and delivery of ties, Girard by his own evidence showed that he had the undelivered ties on hand ready for delivery, and as the uncontradicted evidence in the case is, that there was no difference between the contract price and market value of the undelivered ties at the time and place of delivery, *and as it was agreed by counsel that if the verdict should be for the plaintiff it could not exceed nominal damages*, under the ruling of the Court as to the measure of damages, (Record, page 84), it is respectfully contended that the appeal is frivolous and the judgment should be affirmed.

Parish vs. U. S., 8 Wall. 489, *491.*

All of which is respectfully submitted.

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FRANK GOSNELL,
Counsel for Appellee.

Court of Appeals, District of Columbia,

JANUARY TERM, 1910.

No. 2082.

E. HILTON JACKSON, Trustee of the Estate of Henry N. Girard, A Bankrupt, Appellant,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, a Corporation, Appellee.

REPLY BRIEF FOR APPELLEE.

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Court of Appeals, District of Columbia,

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E. HILTON JACKSON, TRUSTEE OF THE ESTATE OF HENRY N. GIRARD, A BANKRUPT, APPELLANT,

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WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

REPLY BRIEF FOR APPELLEE.

Girard, under his contract, was to "furnish and sell" to the appellees the ties in question. It is not stated in the contract whether he had the ties on hand or whether he was to manufacture them or purchase them. It is in evidence, however, that in order to comply with his contract, he purchased all of the ties with the exception of a few, which he manufactured himself, and which latter were scheduled by him in his bankruptcy proceeding.

If therefore, Girard may show by parole evidence that he was to have purchased the undelivered ties in order to carry

out his contract with the appellee, then in support of our contention urged at the oral argument, that having so purchased them, he should have made reasonable efforts to make sub-contracts as to them or which is the same thing, to sell them on the market, which he could readily have done, according to all the evidence, at the contract price, and without sustaining any loss whatever, we respectfully beg leave to refer the Court to a passage from the opinion of Mr. Chief Justice Fuller in the case of *Boehm vs. Horst*, 178 U. S. 1 (cited in our brief), where the learned Court says, at pages 20, 21 (italics and small caps ours):

> "*As to the question of damages*, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, LESS ANY ABATEMENT *by reason of circumstances of which* HE OUGHT REASONABLY TO HAVE AVAILED HIMSELF. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley vs. Pittsburg Company*, 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. IF THE VENDOR HAS TO BUY instead of to manufacture, *the same principle prevails*, and HE MAY SHOW WHAT WAS THE VALUE OF THE CONTRACT *by showing for what price* HE COULD HAVE MADE SUB-CONTRACTS, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance,

still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

"*In this case plaintiffs* showed AT WHAT PRICES THEY COULD HAVE MADE SUB-CONTRACTS *for forward deliveries* ACCORDING TO THE CONTRACTS IN SUIT, and *the difference between the prices fixed* BY THE CONTRACTS SUED ON AND THOSE *was correctly allowed.*"

The hops, the subject matter of the contracts in *Roehm vs. Horst,* were for future delivery—extending over a period of four or five years. They were not in existence at the time the contracts were made nor at the time of the breach, in fact they were not to be grown for several years after the suit was instituted.

The Court of first instance (Dallas, Circuit Judge) after alluding to the fact that it was in evidence that the plaintiff could have made sub-contracts for the delivery of the hops according to their contracts with the defendant, said "*I have had in mind the right of the plaintiff to compensation,* BUT HAVE ALSO BEEN ESPECIALLY SOLICITOUS TO AVOID DOING INJUSTICE TO THE DEFENDANT."

84 F. R. 565, 571.

In the Circuit Court of Appeals it was said:

"The basis of the recovery was said [*Hinckley vs. Steel Co.*] to be the gain which the plaintiffs would have had, if permitted to complete the contract. The damages of the plaintiffs in this case should be assessed upon the same principle,—THAT OF THE GAIN THERE WAS TO HIM in the contract at the time. *The best means of finding this gain* WAS BY LEARNING THE DIFFERENCE BETWEEN THE PRICE FOR HOPS DELIVERABLE ACCORDING TO THE TERMS OF THE CONTRACT, AND THE PRICE AT WHICH RESPONSIBLE PARTIES IN THE MARKET WERE WILLING TO ASSUME SIMILAR LIABILITIES * * * The record shows at what price such sub-contracts as are above referred to were obtainable and judgment was rendered in accordance therewith."

91 F. R. 345, 349.

It was the above rulings which were approved by the Supreme Court in 178 U. S. 1.

Railroad ties are just as marketable a commodity as hops, there is always a demand for them. According to the decision in *Roehm vs. Horst*, in order to arrive at the correct measure of damages, they need not have been on hand. The ties, however, were on hand, or at least, available, because all the undelivered ties are accounted for when we consider that Girard says he *sold and delivered* 20,000 in New York and elsewhere; he offered 15,000 for sale to appellee after his bankruptcy, and the balance which he manufactured were turned over to the appellant, his trustee. As to the switch ties, Wingfield had them on hand subject to call, and Girard, on November 19th, was offering a similar article for sale to the appellee.

All the ties in controversy could readily and without the slightest effort have been sold by Girard before his bankruptcy *or by his trustee thereafter* at the contract price. No explanation is offered by the appellant as to why he did not make efforts to market the ties (other than those manufactured by Girard), but the reason may have been that Girard had sold them or had at least gotten them under his control, or the fact that the National City Bank was the assignee of Girard's contract may have been an obstacle and prevented the appellant acting in the premises.

Should the appellant be entitled to recover from the appellee, then by Girard's failure to make the slightest effort to avert loss, his vendors will have gotten the market value of the ties undelivered, and consequently, Girard's profit—which Girard or his trustee in bankruptcy, should and would have received had he, Girard, made sub-contracts, as he could have done.

All of which is respectfully submitted.

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